Supreme Court, U. S.
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IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-750

RONALD F. CALVERT,
Petitioner,

vs.

UNITED STATES OF AMERICA.

## PETITION FOR A WRIT OF CERTIORARI

**To the United States Court of Appeals**
**for the Eighth Circuit**

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## PETITION FOR A WRIT OF CERTIORARI

**To the United States Court of Appeals for the Eighth Circuit**

Ronald F. Calvert, your petitioner, respectfully prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Eighth Circuit, entered in the above entitled cause on August 25, 1975.

### OPINIONS BELOW

This cause was decided by a panel of the United States Court of Appeals for the Eighth Circuit on August 25, 1975, in an opinion which has not yet been officially reported. (Excerpts

appear at 17 Cr.L. 2493). The opinion is reproduced as Appendix A hereto.

On September 24, 1975, the Court of Appeals denied petitioner's petition for rehearing and suggestion of appropriateness of rehearing in banc. (See Appendix C.) No opinion was written, and the order has not been officially reported.

## JURISDICTION

The judgment of the United States Court of Appeals was entered on August 25, 1975. (See Appendix B.) A timely petition for rehearing with suggestion of appropriateness of rehearing in banc was denied on September 24, 1975. (See Appendix C.)

On October 15, 1975, Mr. Justice Blackmun extended the time within which to file a petition for writ of certiorari to November 24, 1975.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## QUESTIONS PRESENTED

### I

Whether the grand jury and other proceedings in this case were improper because of invalid authorizations to special attorneys of the Department of Justice.

### II

Whether, in the light of *Brady v. Maryland*, 373 U.S. 83 (1962), and *Giglio v. United States*, 405 U.S. 150 (1972), the

government's misrepresentation as to inducements monetary subsistence payments to a key government witness deprived petitioner of a fair trial.

III

Whether, in the light of *United States v. Maze*, 414 U.S. 395 (1974), the government failed to make a submissible mail and wire fraud case, and whether the Court properly instructed the jury.

IV

Whether evidence of alleged prior crimes and activities of petitioner was properly admitted.

V

Whether hearsay state of mind evidence was properly admitted.

VI

Whether massive publicity deprived petitioner of a fair trial.

VII

Whether petitioner's sentence was improperly imposed and constitutionally excessive.

## STATUTES AND RULES INVOLVED

### Statutes of the United States

**Title 18, United States Code.**

**§ 371. Conspiracy to commit offense or to defraud United States.**

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

**§ 1341. Frauds and swindles.**

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, . . . for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

**§ 1343. Fraud by wire, radio, or television.**

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by

means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

**Title 28, United States Code.**

**§ 515. Authority for legal proceedings; commission, oath, and special attorneys.**

(a) The Attorney General or any other officer of the Department of Justice, or any attorney specially appointed by the Attorney General under law, may, when specifically directed by the Attorney General, conduct any kind of legal proceeding, civil or criminal, including grand jury proceedings and proceedings before committing magistrates, which United States attorneys are authorized by law to conduct, whether or not he is a resident of the district in which the proceeding is brought.

(b) Each attorney specially retained under authority of the Department of Justice shall be commissioned as special assistant to the Attorney General or special attorney, and shall take the oath required by law. Foreign counsel employed in special cases are not required to take the oath. The Attorney General shall fix the annual salary of a special assistant or special attorney at not more than $12,000.

**Federal Rules of Criminal Procedure**

**Rule 12. Pleadings and Motions Before Trial; Defenses and Objections.**

(b) The motion raising defenses and objections.

(2) Defenses and objections which must be raised. Defenses and objections based on defects in the institution of the prosecution or in the indictment or information other than that it fails to show jurisdiction in the court or to charge an offense may be raised only by motion before trial. The motion shall include all such defenses and objections then available to the defendant. Failure to present any such defense or objection as herein provided constitutes a waiver thereof, but the court for cause shown may grant relief from the waiver. Lack of jurisdiction or the failure of the indictment or information to charge an offense shall be noticed by the court at any time during the pendency of the proceeding.

**Federal Rules of Evidence**

**Rule 404. Character Evidence Not Admissible to Prove Conduct; Exceptions; Other Crimes.**

(b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

**Rule 803. Hearsay Exceptions; Availability of Declarant Immaterial.**

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(3) Then existing mental, emotional, or physical condition.— A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not

including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

## STATEMENT

Petitioner was convicted on all counts of a twelve-count indictment (R. 1-17)[1] charging him with seven violations of the mail fraud statute (18 U.S.C. 1341), four violations of the fraud by wire statute (18 U.S.C. § 1343), and one count of conspiracy (18 U.S.C. § 371).

The indictment charged that the two defendants, petitioner Ronald F. Calvert and his father James Henry Calvert, conspired and committed substantive offenses arising out of a scheme to defraud three insurance companies, The Prudential Insurance Company of America, New England Mutual Life Insurance Company, and Underwriter's at Lloyds, London (Lloyds of London). The basic details of the alleged scheme were that the defendants would cause insurance to be placed on the life of Victor Null, an inventor, and as part of the scheme would collect the insurance proceeds after presumably arranging for the death of Null. The substantive counts related to various documents mailed or sent by telegram to or from the various insurance companies involved and one interstate telephone call.

On August 12, 1974, trial commenced against petitioner only. (A severance was granted to his father because of illness.) The trial lasted for approximately 5 weeks, and after the jury deliberated on two separate days, they returned a verdict on September

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[1] "R." refers to the Record on Appeal filed in the Court of Appeals and certified to this Court. "Tr." refers to the nine-volume transcript of trial proceedings. In addition, there were separate typed transcripts of trial testimony of witnesses John Alsop, Charles Hintz and Shirley Null which are referred to herein by the name of the witness.

12, 1974, finding petitioner guilty as charged in all twelve counts. During the trial petitioner was free on bail, but immediately upon the return of the verdict, he was remanded to the custody of the Marshal and has remained in custody ever since, being presently confined at the United States Penitentiary at Leavenworth, Kansas. Release pending appeal was denied by Mr. Justice Blackmun on November 12, 1974.

The two main witnesses against petitioner were Charles Hintz and John Alsop. There was a sharp conflict between their testimony and that of petitioner, who testified in his own behalf. There was no great dispute between the testimony of most other witnesses, who were primarily insurance company and bank employees. During the five weeks of trial, 49 witnesses testified for the prosecution (one in rebuttal), and 16 witnesses, including petitioner, testified for the defense. The evidence necessary for an understanding of the factual background of this case and relevant to the questions presented herein was as follows:

Victor G. Null had invented a revolutionary type of rotary engine. He had secured American patents and was in the process of obtaining foreign patents (Tr. 616-624). His expectations were high and he thought his engine was superior to the Wankel engine for which General Motors had paid $50,000,000.00 (Tr. 1223-1224; Deft. Exh. A), but Null lacked financing to produce a working model and to develop and market the engine.

In the meantime, petitioner Ronald Calvert was looking for an investment for his father, James Henry Calvert, who was retired and needed something to do. Petitioner considered a number of investments and, through a product development agency, became acquainted with Null (Tr. 37-48, 1779-1780). They discussed a partnership, and on May 25, 1972, the V.G.N. Engineering Company (VGN), a partnership, was formed between Calvert Sr. and Null (Govt. Exh. 34).

Petitioner handled all of the discussions, negotiations and transactions for his father. In the course of the conversations, they discussed insurance to provide protection for the father's investment. Accordingly, about the time of the creation of VGN, an application was made on May 22 to Prudential for $500,000.00 insurance on the life of Null, with Calvert Sr. as beneficiary (Govt. Exh. 1). Calvert Sr. paid the premium of $10,480.00 (Govt. Exh. 4). This application was processed by Agent Leveridge of St. Louis, and correspondence was mailed to the Prudential home office in Houston, Texas, including a medical report (Count 1—Govt. Exh. 1B and 1C) and a letter of Leveridge (Count 2—Govt. Exh. 6). Around July 5, the application for $500,000.00 insurance was not approved (Tr. 133).

Through Leveridge, an application was submitted to New England on July 7, (Tr. 134, Govt. Exh. 19). Ultimately $350,000.00 in insurance was issued by New England, including accidental death benefits (Govt. Exhs. 20, 21, 22, 23, 25, 26), with Null as the insured and Calvert Sr. as the beneficiary. In connection with the New England policies, there was correspondence between St. Louis and Boston, the home office, including a letter from Comfort, the New England agent in St. Louis, to Boston on July 10 (Count 3—Govt. Exh. 20), a mailgram from Boston to St. Louis on July 19 (Count 4—Govt. Exh. 21), a letter from Comfort to Boston on July 24 (Count 5—Govt. Exh. 23), and a memo from St. Louis to Boston around September 5 (Count 6—Govt. Exhs. 24, 33; Tr. 403, 598-599). The full first year's commission payable on the New England policies was actually delivered by a New England agent to Prudential agents because they were considered the source of the business (Tr. 1717-1723).

In the meantime Null and petitioner, still acting in behalf of his father, were discussing the development of the engine, and they concluded that additional specialized personnel were

needed to handle accounting, legal and marketing affairs. It was decided to give a small percentage of the partnership to qualified individuals rather than paying them for services. Null desired to retain 50% control, and therefore 7% for the additional participants came out of the original 50% share of Calvert Sr. A new partnership agreement (Govt. Exh. 118) for HCS Turbine Company (HCS) was executed on July 24, 1972, and reflected Null's 50%, Calvert Sr.'s 43% and 7% divided among C.P.A. Shelton, Attorney Gaertner, Walsh and McCoole (Tr. 1141-1152). At all of the meetings prior and subsequent to the creation of this partnership, petitioner attended in behalf of his father and actively participated in discussions and decisions.

The HCS partnership agreement (para. 13) contemplated the purchase of life or disability insurance on partners. A separate agreement was also signed by the HCS partners that they had no interest in the New England insurance, but that it belonged to Calvert Sr. (Tr. 1162-1163, Govt. Exh. 119).

In order to move forward with the building and development of the engine, Null drew plans, and a tool and machine company built a working model and plastic model (Tr. 1325-1326). An office of HCS was located and established in East St. Louis, Illinois, the location having been chosen because of its low rent, adequate parking and proximity to numerous suppliers needed by Null in the development of a working model (Tr. 1588, Govt. Exhs. 35, 86).

At the end of August, petitioner contacted the St. Louis representative of Lloyds who in turn contacted the London office, and within about 10 days an accident policy for $2,000,000.00 on Null was approved by Lloyds (Govt. Exh. 76-A; Tr. 926-944, 947-957). No investigation by Retail Credit Corporation, similar to their investigations for Prudential and New England, was made; Lloyds relied only upon the appli-

cation and information furnished by petitioner (Tr. 956). In connection with the Lloyds policy, correspondence included a letter from the St. Louis manager to London on September 1 (Count 7—Govt. Exhs. 69, 123), a letter to Gaertner on September 8 (Count 8—Govt. Exh. 71), a teletype from St. Louis to London on September 11 (Count 9—Govt. Exh. 72), and one in reply on September 13 from London (Count 10—Govt. Exh. 73).

On November 9, 1972, Null's body was found in the East St. Louis office (Tr. 1455). He had been shot and murdered. (To this date, the murderers have not been apprehended.)

The foregoing facts were not seriously disputed at the trial; for the most part they were established or corroborated by documents. There was other evidence, however, on which government witnesses and petitioner conflicted, primarily over prosecution efforts to prove that petitioner intended and attempted to cause Null's death.

Hintz, one of the two crucial government witnesses, testified that he had been acquainted with petitioner for many years and saw him again in the fall of 1971. Several months later petitioner showed him a check for $300,000.00 representing proceeds of sale of a business, and Hintz expressed interest in investing in a business (Hintz Tr. 4-5, 7-10). Later petitioner told Hintz that he was seeking inventors so that he could insure them and collect on the insurance. Petitioner suggested that Hintz make the insurance application and then explained how they would divide the proceeds (Hintz Tr. 13-22). Hintz and petitioner investigated several potential businesses, but nothing materialized (Hintz Tr. 24-44). Because of petitioner's interest in purchasing some equipment, Hintz put him in contact with Alsop in 1972 (Hintz Tr. 45-46). After the death of Null, petitioner told Hintz to tell Alsop not to talk and threatened Alsop's daughter. Petitioner also

said that he had concocted a story that Hintz wanted to buy rights to the Null engine (Hintz Tr. 49-52).

Petitioner contradicted Hintz and testified that Hintz was interested in business ventures and brought several to petitioner, but nothing materialized (Tr. 1799-1825). He denied the insurance conversations (Tr. 1811). Petitioner also testified that Hintz wanted to buy rights to the Null engine, but his offer was rejected (Tr. 1825-1830). After Null's death, Hintz told petitioner that Alsop wanted money from petitioner or he would say he was approached to kill Null, but Hintz could control Alsop if petitioner would arrange for Hintz to get the engine (Tr. 1831-1835). Petitioner denied any threats to Alsop's daughter (Tr. 1836).

Alsop, the other crucial government witness, testified that he saw petitioner and Hintz in summer 1972 and they discussed the purchase by petitioner of a piece of equipment and that Alsop knew someone who could be helpful in a rezoning (Tr. 151-152). On November 1, petitioner came to the Alsop house and offered him $5,000.00 to kill an inventor (Tr. 154-162). The next day, petitioner called and offered more money (Tr. 164-166). (This call was the basis of Count 11 of the indictment.) After Null's death, petitioner again visited Alsop and said he was not concerned about the investigation of the Null killing, and then petitioner talked about zoning problems (Tr. 166-169).

Petitioner testified that he saw Alsop in April 1972 concerning a high lift and then they talked about zoning (Tr. 1843-1847). Around November 1, he saw Alsop but only as to zoning (Tr. 1847-1849). He called him the next day, but Alsop was not home (Tr. 1850). Petitioner contacted Alsop again several times for the name of a lawyer who could handle the zoning problem, and Alsop finally gave it to him (Tr. 1850-1854). Petitioner denied that he had ever discussed with Alsop any

killing of Null and never mentioned Null's name to Alsop (Tr. 1851).

At the close of all the evidence, the Court overruled petitioner's motion for judgment of acquittal (Tr. 2037). The cause was submitted to the jury after argument (Tr. 2076-2181), and the Court's charge to the jury (Tr. 2181-2215), to which petitioner made certain objections (Tr. 2065-2072). The jury returned a verdict finding petitioner guilty on each count (Tr. 2220-2221). Petitioner was immediately remanded to the custody of the Marshal (Tr. 2225).

The Court sentenced petitioner to 5 years imprisonment on each count, but the sentences on several counts were to run concurrently, so that the total time to which petitioner was sentenced was 45 years (Tr. 2230-2234). A tabulation of the sentences appears as Appendix D to this brief.

Petitioner duly filed his notice of appeal to the United States Court of Appeals for the Eighth Circuit. On August 25, 1975, a panel of the Court of Appeals filed an opinion (Appendix A) affirming petitioner's conviction. Petitioner's timely petition for rehearing and suggestion of appropriateness of rehearing in banc was denied on September 24, 1975. (See Appendix C.)

This petition for a writ of certiorari seeks to review the judgment of the Court of Appeals affirming petitioner's conviction.

## REASONS FOR GRANTING THE WRIT

### I

**Authority of Special Attorneys.**

In the fall of 1974, as a result of an opinion in *United States v. Williams*, No. 74 CR 47-W-1, by the Honorable John W. Oliver, United States District Judge for the Western District of Missouri, an issue affecting the administration of criminal justice came to light. Judge Oliver ruled that special attorneys of the Department of Justice, operating under very broad letters of appointment, were not properly appointed pursuant to 28 U.S.C. § 515 and that their appearance before grand juries was improper; the grand jury proceedings being tainted, he ordered an indictment dismissed. Thereafter this issue was raised in numerous cases, and decisions by District Courts have been in hopeless conflict. (The government appealed in the *Williams* case, but thereafter dismissed its appeal. See No. 75-1034 in the Eighth Circuit Court of Appeals.)

When this issue became known, petitioner had already been convicted herein and had appealed to the Court of Appeals. At his request, the cause was remanded by the Court of Appeals to the District Court for a hearing on this issue. The District Court was presented with letters of authority of special attorneys who had participated in this case, and, after a hearing, the trial Court overruled petitioner's motion on the merits. The cause was then returned to the Court of Appeals which ruled adversely to petitioner.

The Court of Appeals decided that the objection was waived because not presented before trial, citing Rule 12(b)(2) of the Federal Rules of Criminal Procedure, and *Davis v. United States*, 411 U.S. 233 (1973). We believe the Court was in error in suggesting a waiver, because Rule 12(b)(2) recognizes that

"the court for cause shown may grant relief from the waiver"; here there was good cause for such relief because the issue had not become known until after the conviction. Cf. *Rollerson v. United States*, 405 F. 2d 1078, 1081 (D.C. Cir. 1968), judgment vacated, 394 U.S. 575 (1969), where the Court of Appeals was sensitive to "a supervening change in the law which creates a more favorable climate for the point."

*Davis v. United States* does not justify a bar to the consideration of this issue; a careful reading sanctions relief from waiver under the particular circumstances of this case, where the issue was raised as soon as it became apparent, and petitioner did not wait until completion of all appellate proceedings. Compare *Fernandez v. Meier*, 408 F. 2d 974 (9th Cir. 1969), *Kaufman v. United States*, 394 U.S. 217 (1969), and *Fay v. Noia*, 372 U.S. 391 (1963). There has certainly been no deliberate by-pass or intentional disregard or waiver of the issue by petitioner herein.

Finally, and perhaps most significant on the waiver point is the fact that the District Court here, upon remand of the cause, considered this issue on its merits. He did not deny relief to petitioner because of any waiver or failure to show cause. Note that in *Davis* this Court pointed out that the District Court had specifically made a finding that there was no showing of cause to justify relief from the waiver. Here the government raised the waiver issue in its pleadings in the District Court, but the District Judge did not base his judgment on any waiver; instead he went to the merits and decided the issue adversely to petitioner. Thus, the Court of Appeals was in error in suggesting that there was a waiver.

* * * * * * *

On the merits, the Eighth Circuit has ruled on this issue in several cases mentioned in its opinion—*United States v. Wrigley*, 520 F. 2d 362 (8th Cir. 1975), *United States v. Agrusa*, 520

F. 2d 370 (8th Cir. 1975), and *DiGirlomo v. United States*, 520 F. 2d 372 (8th Cir. 1975). See also *United States v. Burnett*, 520 F. 2d 1373 (8th Cir. 1975), and a decision of the Second Circuit, *In re Persico*, — F. 2d — (No. 75-2030, June 19, 1975). We understand that petitions for certiorari have been filed by Wrigley, DiGirlomo and Burnett.

We will not lengthen this petition by extended argument on this Question, except to suggest that it is a substantial issue requiring determination by this Court. (See *United States v. Crispino*, 392 F. Supp. 764 (S.D.N.Y. 1975), and the historical analysis in *In re Persico*.) We join the reasons given in other petitions presenting the same issue. We respectfully submit that this Court should cause a thorough review of the entire procedure in the Department of Justice for the authorization and utilization of special attorneys.

Among the variety of improprieties are the following: Letters of authorization have been signed by unauthorized people;[2] the letters of authorization are much too broad and lack the specificity required by § 515; the letters and the oaths of office frequently do not include authorization to investigate cases involving statutes in which the special attorneys are acting.[3] It has also come to light recently that special attorneys are being given simultaneous letters of authorization for a multitude of districts, indicating that there is an indiscriminate practice of

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[2] In two instances in the United States District Court for the Eastern District of Missouri, cases were dismissed and new indictments had to be obtained because letters of authorization were admittedly signed in December 1974 by a secretary to the Deputy Attorney General, seven months after this Court's decisions in *United States v. Giordano*, 416 U.S. 505 (1974), and *United States v. Chavez*, 416 U.S. 562 (1974). See *United States v. Ballard*, No. 74-317 CR (4), and *United States v. Gryder*, No. 74-331 CR (3).

[3] As an example, the letters of authorization and oaths of office of the two trial attorneys in this case did not refer to cases involving 18 U.S.C. § 371, 1341 and 1343.

authorizations which could be extended throughout the entire country.

We respectfully suggest that it would be appropriate for this Court to order the Department of Justice to make full disclosure of their procedures for authorizing special attorneys to appear in District Courts throughout the country. It should be done now so that hundreds of dismissals could be avoided, as resulted from this Court's decisions in *United States v. Giordano* and *United States v. Chavez*.

Because of the conflict which exists among various lower courts and because of the importance of this issue in the administration of criminal justice, we respectfully suggest that certiorari should be granted as to this Question.

II

**Inducements to Government Witnesses.**

Hintz and Mr. and Mrs. Alsop were crucial government witnesses; without their testimony, there would have been no case. Thus, it was important to petitioner to attempt to destroy their credibility, and one method of doing so was to ferret out the reasons and inducements for their testimony.

Prior to their testimony, petitioner requested the government to advise him of all promises, immunity, inducements or other benefits given to the witness. The government's response was merely that there were no promises or inducements except protection (Tr. 483-484, Alsop Tr. 176-177). That such promises, inducements and benefits which were extended by the government should have been disclosed is hardly subject to question in the light of *Napue v. Illinois*, 360 U.S. 264 (1959), *Brady v. Maryland*, 373 U.S. 83 (1962), and *Giglio v. United States*,

405 U.S. 150 (1972). See also *DeMarco v. United States*, 415 U.S. 449 (1974).

The exact representation by the prosecutor was: "He has had no promises of immunity and the only other promises we've made him is that Ronnie Calvert or any of his friends won't be able to kill him if we can prevent it." To the Court's question as to whether any other benefits had been given to him, government counsel stated: "Other than the normal benefits associated with witness protection." (Tr. 484). In the context of this representation by the prosecutor, defense counsel justifiably assumed that the only benefits given to Hintz was the protection of a United States marshal. Nothing was said (instead it was concealed from defense counsel and the trial Court) that Hintz was being paid; the implication of government counsel was that he was not being paid.

Upon such representations, the defense did not explore this issue on cross-examination of Hintz. It was not until the testimony of Mr. Alsop that petitioner became aware of, and, with great difficulty, was able to develop some evidence concerning such inducements. Alsop finally acknowledged that he was being paid by the government (Alsop Tr. 194-197), in direct contradiction of the prosecutor's denial of any such inducements.

The prosecutor never did reveal the payments to Hintz during the trial. *The first acknowledgment by the government of the Hintz subsistence payments finally appeared in its brief in the Court of Appeals!*

Such misrepresentation by the government prosecutor and his failure to disclose such crucial evidence were contrary to *Napue*, *Brady* and *Giglio*, and the many cases which have followed them. See, for example, *United States v. Harris*, 462 F. 2d 1033 (10th Cir. 1972); *United States v. Mele*, 462 F. 2d

918 (2nd Cir. 1972); *United States v. Kaplan*, 470 F. 2d 100 (7th Cir. 1972); *United States v. Tashman*, 478 F.2d 129 (5th Cir. 1973); *Taylor v. United States*, 487 F. 2d 307 (2nd Cir. 1972); *United States v. Gerard*, 491 F. 2d 1300 (9th Cir. 1972), and *Teague v. United States*, 499 F. 2d 1381 (7th Cir. 1974).[4] See also *United States v. Butler*, — F. 2d — (9th Cir. No. 74-2201, decided December 18, 1974), for a discussion of non-disclosure and obligations of prosecutors to disclose benefits to witnesses. And for a case holding it to be reversible error to limit the defense in discovery of the full extent of subsistence benefits paid to a key government witness, see *United States v. Partin*, 493 F. 2d 750, 757-760 (5th Cir. 1974).

It is true, as the opinion of the Court of Appeals says here, that defense counsel did not probe the area of promises and benefits in cross-examining Hintz. But there was no reason to probe that area in view of the assurances and representations by government counsel to the Court and defense counsel that there had been no benefits or payments. The fact that Alsop acknowledged receiving payments[5] gave no indication that Hintz was receiving similar relocation payments, especially in the light of the assurance by government counsel to the contrary. Even after Alsop admitted it, there was still no reason for Hintz to be recalled for further cross-examination in an area where government counsel had already represented to the Court and defense counsel that such cross-examination would be fruitless.

The Court of Appeals says that petitioner suffered no prejudice because defense counsel was permitted to theorize in clos-

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[4] The Eighth Circuit itself is in conflict, for another panel has reached the opposite result in *United States v. Librach*, 520 F. 2d 550 (8th Cir. 1975).

[5] It was asked on cross-examination of Alsop after he had mentioned the payments to defense counsel in an interview prior to his testimony.

ing argument that the government must have been paying Hintz. Such speculation could not overcome the prejudicial error created by the government's deliberate concealment of crucial facts, especially in view of the Court's instructions to the jury that closing arguments "are not evidence" (Tr. 2183).

This petition presents a deliberate, calculated and successful effort by government counsel to conceal the fact of substantial relocation payments made to crucial witnesses, contrary to decisions of this Court. Because of this clear conflict, we respectfully suggest that certiorari should be granted as to this Question. (On the facts of this case, we further suggest that summary per curiam reversal would be appropriate.)

## III

**Submissible Case (Instruction).**

The government's theory in this case apparently was that petitioner used the mails in a scheme to procure insurance on the life of Mr. Null while he had the intent to cause the death of Null. We believe that under this Court's decision in *United States v. Maze*, 414 U.S. 395 (1974), there was no use of the mails for the purpose of executing the scheme, and therefore the conviction cannot stand. The same question articulated in *Maze* exists in the instant case: "But the more difficult question is whether these mailings were sufficiently closely related to [petitioner's] scheme so as to bring his conduct within the statute."

The mailings here were only incidental to any scheme which may have existed. Assuming petitioner had the guilty intent and wanted to obtain insurance with the intent that Null subsequently would be murdered, the correspondence between representatives of the insurance companies had nothing to do

with the carrying into effect of such a scheme. It certainly made no difference to the success or failure of the scheme whether the mails were used.

*Maze*, as well as two earlier cases, *Kann v. United States*, 323 U.S. 88 (1944), and *Parr v. United States*, 363 U.S. 370 (1960), clearly show that the Court of Appeals is in error in deciding that this was a proper mail fraud prosecution. There was no use of the mails for the purpose of executing a scheme, nor was there sufficient connection between the mailings and the execution of the scheme. Under these circumstances, no offense was committed.

Although this Court sought to limit the broad and unintended use of mail fraud statutes (see footnote 10 of *Maze*), courts are nevertheless disregarding the doctrine of this Court and are applying Sections 1341 and 1343 to factual situations never contemplated by the mail and wire fraud statutes. Certainly Congress had no intention to apply the statutes to a case basically involving a complaint of murder. If petitioner was guilty of murder, he should have been tried for that offense, but not under Sections 1341 and 1343. We respectfully suggest that it would be appropriate for this Court to check this unwarranted extension of the fraud statutes by further delineating their standards of applicability.

But even if there could arguably have been a mail fraud offense and a jury question of whether the mailings had sufficient relationship to the scheme, then at the very least the trial Court should have given Defendant's Instruction No. 12A:

> "The Court instructs the jury that, in order to constitute an offense against the laws of the United States, the use of the mails or wire facilities must be for the purpose of executing a scheme or artifice to defraud. It is not sufficient merely that the use of the mails or wire facilities occurred. There must be a connection between the

use of the mails or wire facilities and the execution of the scheme, and the use of the mails or wire facilities must be an essential part of the alleged scheme. Furthermore, the defendant must have contemplated the use of the mails or wire facilities.

Therefore, unless you find and believe beyond a reasonable doubt that the use of the mails and wire facilities was an essential part of a scheme or artifice to defraud, if you find that such a scheme or artifice existed, and that without such use of the mails or wire facilities, the alleged scheme could not have succeeded, and that the defendant specifically contemplated that the mails or wire facilities would be used and that such use should be an essential part of such alleged scheme or artifice, then you must find the defendant not guilty."

If there was a submissible case, this instruction was a proper statement of the *Maze* law and was not covered elsewhere.

Because of the conflict of the opinion of the Court of Appeals with the decisions of this Court, and because of the need for further clarity in the application of the mail and wire fraud statutes, we respectfully suggest that certiorari should be granted as to this Question.

IV

**Other Crimes and Activities.**

In their attempt to prove petitioner's participation in a scheme to defraud insurance companies by obtaining insurance on Null's life and then causing his death, the prosecution offered evidence of prior activities of petitioner. Among them were negotiations with Held (Tr. 646), Baker (Tr. 697), Hintz (Tr. 27), and Mrs. Beck (Tr. 720, Hintz Tr. 34) concerning prior

investigations by petitioner of prospective business ventures. There was also brief testimony referring to the 1969 wounding of a former employer of petitioner, Schucardt, with petitioner being beneficiary of an insurance policy on his life. Schucardt was not called as a witness, despite the prosecutor's assurance when the testimony first appeared that he would be a witness (Tr. 1265-1266).

All of this testimony of prior activities, with implications of criminal aspects, should not have been admitted. But the most flagrant violation of the rules of evidence was the admission of that pertaining to the accidental killing of Edwards, a former partner of petitioner in a business unrelated to Null. Edwards was killed in 1970 by accidental gunshot fired by Donald Deal; petitioner and another surviving partner collected nearly $300,-000.00 each on insurance on Edwards' life. Walsh, a partner in HCS, was permitted to testify that petitioner had explained his involvement in the matter to the HCS partners (Tr. 1264). Mrs. Edwards testified concerning her husband's death (Tr. 745, 890), and police officers testified (Tr. 831, 848) as to the circumstances of the killing which took place two and one-half years prior to the Null killing. Court records concerning settlement of the insurance claims were also introduced (Tr. 807). Petitioner was never even arrested for the killing of Edwards, and the insurance companies paid the full amount of the policies (Tr. 817).

Each of these transactions was completely unrelated to the Null insurance and killing. The Schucardt and Edwards matters took place several years prior to petitioner's dealings with Null. The others occurred prior to his meeting Null when he was looking for an investment for his father. Petitioner found himself in the position of defending, without forewarning, against numerous other transactions and suggested crimes not alleged in the indictment. (It was a stroke of luck and quite by accident that petitioner was able, during the lengthy trial, to develop the

bad credit standing of Mr. Baker (Tr. 1615). Obviously petitioner was not aware of it at the time of cross-examination.) The "red herring" of Schucardt was mentioned but never further developed.

As to Edwards, the prosecution did not alert petitioner in advance of the issue of the unreasonable search and seizure of the shotgun shell (Govt. Exh. 83, Tr. 858). Petitioner was suddenly required to defend against an uncharged and unrelated murder accusation. There was no justification for the prosecutor to be waving the shotgun used in the accidental killing of Edwards (Govt. Exh. 80, Tr. 850). Consider the psychological impact upon the jury of the deadly shotgun which killed Edwards (not Null and not by petitioner), especially in the absence of any weapon related to the Null killing. The danger and prejudice in permitting a trial to degenerate into tangential factual issues of other transactions was never more apparent than in the instant case.

The Court of Appeals approved the admission of all this evidence of other acts and possible crimes, under the authority of Rule 404(b) of the Federal Rules of Evidence.[6] In its longest section, the opinion analyzes the new Rule and discusses its application, but the Court of Appeals acknowledges the difficulties created by the Rule and the differences of opinions concerning this most troublesome area of the law of evidence. (See footnote 10 and 11 of opinion below.)

Weinstein, in his recently published treatise on the new Rules of Evidence also recognizes the conflict in opinions (para. 404 [08], pp. 404-40):

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[6] The new Rules of Evidence became effective after the trial and Court of Appeals opinion. Cf. *United States v. Nobles*, — U.S. —, 95 S.Ct. 2160, 2167 (1975), where this Court said in footnote 6:

> "As the Federal Rules of Evidence were not in effect at the time of respondent's trial, we have no occasion to consider them or their applicability to the situation here presented."

> ". . . the question of when evidence of a particular criminal act may be admitted is so perplexing that the cases sometimes seem as numerous 'as the sands of the sea,' and often cannot be reconciled."

Further, at para. 404[09], pp. 404-57, there is a discussion of the plan or design theory of admissibility:

> "Most troublesome are cases which admit proof of other crimes as evidencing a plan or design from which it can be inferred that defendant committed the crime in question. Courts use the plan or design label in a variety of somewhat overlapping situations."

The conflict among the authorities over the admissibility of evidence of other activities and crimes has not been resolved by Rule 404(b). It would be appropriate for this Court now to delineate guidelines for the application of the new Rule, thereby avoiding many trial problems and potential appeals.

Because of the importance of a resolution of this issue to the administration of criminal justice, and to avoid conflicts among lower courts and obviate numerous appeals, we respectfully suggest that certiorari should be granted as to this Question.

## V

**Hearsay State of Mind and Intentions of Mr. and Mrs. Null.**

Mrs. Null was permitted to testify as to conversations with her husband in the privacy of their home shortly before his death. Over objection, she testified to conversations expressing their joint fears, his intentions and their respective states of mind. Among her testimony was the following: (1) that they were fearful over the location of the office in East St. Louis (Null Tr. 11); (2) that her husband intended to move the office (Null

Tr. 9-10), to cancel the insurance (Null Tr. 12-13), and to talk to Shelton and petitioner about cancelling the insurance and terminating the partnership (Null Tr. 13, 15), although later she said that he was just going to talk to Shelton (Null Tr. 18); (3) that she wanted him to get out of the HCS partnership and he said he intended to because they were frightened of the insurance (Null Tr. 14, 17); and (4) that when he got out of the partnership he was going to build another engine which was then in his head (Null Tr. 16). She indicated that these discussions occurred within a short period of time prior to his death and that she kept insisting that he take care of these matters and he said he would. The implication of all of this uncorroborated testimony was that Null's fears, intentions and state of mind were expressed to petitioner and thus provided him with a motive to cause Null's immediate murder. (It is interesting to note that when the prosecutor earlier attempted to obtain the same type of evidence from Mrs. Edwards, the Court sustained the defense objections (Tr. 891-893).)

This self-serving hearsay testimony of Mrs. Null was highly inflammatory and prejudicial to petitioner. There was no way for petitioner to rebut it except to attempt to prove that she had ulterior and financial motives for fabricating. Such cross-examination could and probably did have a harmful effect upon the jury, which would brand the defense as being insensitive to the feelings of the recently bereaved widow. To permit such testimony encourages perjury, for there is no means by which it can be contradicted. It was to prevent such problems that the hearsay rule was adopted; it should not now be abandoned by recognizing a new and dangerous exception.

The Court of Appeals here relied on *Mutual Life Insurance Co. v. Hillmon*, 145 U.S. 285 (1892), to approve the admission of this testimony, also citing Federal Rules of Evidence 803(3). *Hillmon* has, of course, generated considerable discussion and controversy (see Weinstein's Evidence, para. 803(3)[04] and

[05]); we believe that its application here to the testimony by Mrs. Null of the states of mind of herself and her husband was erroneous. Compare *People v. Ireland*, 70 C. 2d 522, 75 Cal. Rptr. 188, 450 P. 2d 580 (1969), where state of mind evidence was determined to be inadmissible under a state statute similar to Rule 803(3). Also the case of *United States v. Brown*, 490 F. 2d 758 (D.C. Cir. 1974), although lengthy, is well worth reading for its full discussion of all of the principles applicable to state of mind evidence. (In the instant case, no limiting instruction was given.)

In view of the decisions and comment since *Hillmon* and the recent adoption of Rule 803(3), we believe that this case presents an opportunity for this Court to review and clarify the law with reference to "state of mind" evidence. Future controversy and appeals may be avoided if guidelines can be developed. For these reasons, we respectfully suggest that certiorari should be granted as to this Question.

## VI

## Publicity

Null's murder in November, 1972, was reported in detail at the time, but had been discontinued long before petitioner's indictment. Suddenly in March, 1974, on the day before the indictment was voted, radio and television reported that an indictment was imminent (4/19 Tr. 3). Petitioner sought to determine the source of these reports at the hearings on April 19 and April 26, 1974.[7] The reporters were subpoenaed to dis-

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[7] The District Court was also concerned about this leak of information (4/9 Tr. 4):

> "Well, I became aware of this for other reasons, primarily because it's been the insistence of the judges of this district that that type of publicity prior to indictment not get out. In other words, I think the record will show that the judges of this district take an exceeding dim view of that type of thing going on, primarily because we believe that the Grand Jury system should be inviolate and not subject to leaks and publicity. . . ."

cover the sources of their information, but each refused to answer on the ground of an alleged First Amendment privilege. The Court sustained their objections and refused to order them to reveal the sources of their information (4/19 Tr. 8-16; 4/26 Tr. 6-16). The Court of Appeals affirmed in footnote 4.

The Courts below disregarded this Court's ruling in *Branzburg v. Hayes*, 408 U.S. 632 (1972). Although *Branzburg* related to a grand jury subpoena, we submit that there is no distinction for a witness subpoenaed to an open court hearing for the purpose of eliciting relevant information as to sources of information and leaks from the grand jury. This Court recognized that a number of cases "have concluded that the First Amendment interest asserted by the newsman was outweighed by the general obligation of a citizen to appear before a grand jury or *at trial*, pursuant to a subpoena, and give what information he possesses." (Emphasis supplied.) This Court pointed out that some states have provided a statutory privilege to newsmen, but the majority have not done so "and none has been provided by federal statute. Until now the only testimonal privilege for unofficial witnesses that is rooted in the Federal Constitution is the Fifth Amendment privilege against compelled self-incrimination. We are asked to create another by interpreting the First Amendment to grant newsmen a testimonial privilege that other citizens do not enjoy. This we decline to do." The Court saw nothing wrong in "insisting that reporters, like other citizens, respond to relevant questions put to them in the course of a valid grand jury investigation or criminal trial."

On the basis of *Branzburg*, the Courts below should have been interested in determining the source of leaks from the grand jury.[8] Such further action, including dismissal of the indictment,

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[8] The suggestion in footnote 4 of the Court of Appeals opinion that petitioner was not entitled to relief because there was no showing of prejudice begs the issue. In the first place, how could petitioner show prejudice without knowing the entire background? Had the

could then have been taken as might have been warranted by the evidence developed from the reporters. The lower Courts' disregard of *Branzburg* should be corrected by this Court.

* * * * * * *

The publicity which was generated during the trial was prejudicial to petitioner. Publicity which affects or which may possibly have an effect upon the fairness of a trial constitutes a deprivation of due process of law. *Estes v. Texas*, 381 U.S. 532 (1965), *Sheppard v. Maxwell*, 384 U.S. 333 (1966), *Rideau v. Louisiana*, 373 U.S. 723 (1963), *Irvin v. Dowd*, 366 U.S. 717 (1961), *Chapman v. California*, 386 U.S. 18, 43-44 (1967), (Stewart, J., concurring.) Whenever it appears that prejudicial matter has been publicized in the news media, it is presumed that it has come to the attention of the jury, and that the defendant has been prejudiced; the trial cannot proceed unless the Court is satisfied to the contrary. *Mares v. United States*, 383 F. 2d 805, 808-809 (10th Cir. 1967), *Pamplin v. Mason*, 364 F. 2d 1 (5th Cir. 1966), *Silverthorne v. United States*, 400 F. 2d 627, 644 (9th Cir. 1968).

Here the trial atmosphere was saturated with the news media and reporters' intrusions.[9] Prejudicial publicity occurred on the eve of the trial—see Motion for Transfer of Cause filed July 26, 1974 (R. 145-146). Frequently during the trial, petitioner complained and the Court recognized the impositions of the press, not only by what was printed (Tr. 564, 604, 787) but by the hovering of reporters in the court room and around counsel

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testimony been compelled, we believe prejudice could have been developed from a showing of government leaks. Finally, in matters of publicity, this Court has often said that prejudice is presumed. See *Chapman v. California*, 386 U.S. 18, 43-44 (Stewart, J., concurring), and cases therein cited.

[9] We are submitting with this brief a package of copies of most of the newspaper articles which appeared in the local press while the trial before the unsequestered jury was being conducted. Radio and television coverage was equally pervasive.

tables during recesses (Tr. 543, 669, 1194), in the corridors and at the entrances to the court room; flashbulbs were popping and television lights were glaring (Tr. 897, 1198, 1472, 1486). The trial Court acknowledged that there were "glaring inaccuracies" in the papers (Tr. 562), referred to "these news hounds running around here" (Alsop Tr. 174), and after commenting to the jury about "a lot of photographers around in the halls," finally late in the trial, after the damage had been done, ordered the photographers and news and TV cameramen removed from around the jury room (Null Tr. 25).

The opinion of the Court of Appeals attempts to create the impression that the trial judge took adequate protective measures, but a reading of the entire transcript can lead only to the conclusion that such protective efforts as were made were too little and too late. The damage had already been done. It is true that on several occasions the Court questioned the jurors as to their exposure to the publicity, but we believe that the perfunctory questioning and routine admonitions to the jury could not undo the prejudice which occurred. Even the prosecutor acknowledged that the jurors, being "only human", would be affected by the publicity (Tr. 565). Compare *United States v. Bear Runner*, 502 F. 2d 908 (8th Cir. 1974).

The Court of Appeals reliance on *Murphy v. Florida*, — U.S. —, 95 S. Ct. 2031 (1975), is misplaced. The analysis in *Murphy* of prior decisions of this Court requires a reversal here of this federal trial—compare the concurrence of Mr. Chief Justice Burger in *Murphy*. The constant presence of the media pervaded the trial to create a Sam Sheppard and Billy Sol Estes atmosphere. Petitioner could not have had a fair trial under these circumstances.

Because the prejudicial publicity denied petitioner a fair trial and because of the conflicts with decisions of this Court, we respectfully suggest that certiorari should be granted as to this Question.

## VII

**Excessive Sentence.**

Petitioner was convicted of seven counts of mail fraud violations (18 U.S.C. § 1341), four counts of wire fraud violations (18 U.S.C. § 1343), and one count of conspiracy (18 U.S.C. § 371). Each count carried a maximum of five years imprisonment. By a complicated, unexplained[10] and apparently haphazard method of concurrent and consecutive sentences of five years on each count, the District Court sentenced petitioner to a total of 45 years imprisonment (Tr. 2230-2234). See Appendix D.

Petitioner was charged with a series of interrelated counts with a five year maximum. This was not similar to the traditional mail fraud case with a mailing to each *separate victim* being the subject of a *separate count*—a legitimate basis for the oft-quoted rule that each separate mailing may be the subject of a separate count. Nor was petitioner charged with murder—there was no proof that he caused the murder of Null, and in fact, as the trial commenced, the prosecutor admitted that there was no evidence petitioner "held the gun or fired the bullet" (Tr. 19).

The government's method of multiple substantive counts arising out of one series of transactions was an important form of pleading to facilitate a sentence in excess of the maximum prescribed for the substantive offense. Cf. *United States v. Gallington*, 488 F. 2d 637, 640 (8th Cir. 1973). Counts 1 and 2 each pertained to Prudential, Counts 3, 4, 5 and 6 to New England, Counts 7, 8, 9 and 10 to Lloyds, and Count 11 was a separate interstate telephone call; Count 12 then repeated all the

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[10] The sentencing judge gave no explanation at the time of sentencing for the excessive sentences. The presentence investigation report was not made available to the defense, despite a request therefor (Tr. 2226).

substantive counts in the conspiracy charge (R. 1-17). If petitioner was guilty of anything (which of course we deny), it was of one scheme revolving around the death of Null; it was improper to split the alleged offense into numerous potential five-year sentences. Petitioner's motion to require the government to elect should have been sustained (R. 27).

In a recent mail fraud case, the Tenth Circuit remanded the case for reconsideration of consecutive sentences, even though each separate sentence was within the statutory maximum. *United States v. Mackay*, 491 F. 2d 616 (10th Cir. 1974), cert. denied, 416 U.S. 972 (1974). See also *United States v. Canty*, 469 F. 2d 114 (D.C. Cir. 1972), where the Court considered "the allowable unit of prosecution", and held that the robbery of each teller in a bank could not be separately charged under bank robbery statutes because there was just one bank robbery. Similarly, here the allowable unit of prosecution necessarily had to be the scheme to obtain insurance and cause the death of Null, not each individual letter or telephone call. As said in the *Canty* case (l.c. 126-127):

> "Even assuming that the intent of the statute in this regard is not perfectly clear, the Supreme Court has held that, unless a statutory intent to permit multiple punishments is stated 'clearly and without ambiguity, doubt will be resolved against turning a single transaction into multiple offenses.' Bell v. United States, 349 U.S. 81, 84, 75 S.Ct. 620, 622, 99 L.Ed. 905 (1955). See also Heflin v. United States, 358 U.S. 415, 419-420, 79 S.Ct. 451, 3 L.Ed. 2d 407 (1959); Ladner v. United States, 358 U.S. 169, 177-178, 79 S.Ct. 209, 3 L.Ed. 199 (1958); United States v. Universal C.I.T. Corp. [344 U.S. 218, 221, 73 S.Ct. 227, 229, 97 L.Ed. 260 (1952)]."

See also *United States v. Fleming*, 504 F. 2d 1045 (7th Cir. 1974).

It was improper to charge, convict and sentence petitioner separately on each count. If he was guilty of an offense, it was one continuing offense. For the government to split it into separate segments approaches the point of double jeopardy prohibited by the Fifth Amendment to the Constitution of the United States. The error was further compounded by the imposition of consecutive sentences. See *Prince v. United States*, 352 U.S. 322 (1957), *Heflin v. United States*, 358 U.S. 415 (1959), *United States v. Chester*, 407 F. 2d 53, 55 (3rd Cir. 1969), *United States v. Welty*, 426 F. 2d 615 (3rd Cir. 1970), and *Moore v. United States*, 432 F. 2d 730, 740 (3rd Cir. 1970).

Numerous cases have rejected attempts at multiple count prosecution. In *Braverman v. United States*, 317 U.S. 49 (1942), there were seven conspiracy counts, but this Court held that only one penalty could be imposed. In *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218 (1952), there were multiple counts for violation of the Fair Labor Standards Act. This Court said (l.c. 224) that the offense made punishable under the act is a course of conduct, and disapproved multiple counts. In the leading case of *Bell v. United States*, 349 U.S. 81, 83-84 (1955), a two-count Mann Act prosection for transportation of two women on the same trip, this Court decided that a clear congressional intent must be evident before multiple prosecutions may be sanctioned. See also *Gebhard v. United States*, 442 F. 2d 281, 289-290 (9th Cir. 1970), and *Yates v. United States*, 355 U.S. 66 (1957), where this Court held that there could be only one contempt for numerous refusals to answer separate questions on two days. Cf. American Bar Association, Standards of Criminal Justice Relating to Sentencing Alternatives and Procedures, § 3.4.

We believe the opinion of the Court of Appeals is in conflict with those of other circuits and of this Court, as well as the

thinking expressed by the ABA Standards. Because of such conflicts, we respectfully suggest that certiorari should be granted as to this Question.

## CONCLUSION

For these reasons it is respectfully submitted that this petition for writ of certiorari should be granted.

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## APPENDIX A

United States Court of Appeals
for the Eighth Circuit

No. 74-1716

United States of America,
Appellee,

v.

Ronald F. Calvert,
Appellant.

Appeal from the United States District Court for the Eastern District of Missouri.

Submitted: June 12, 1975

Filed: August 25, 1975

Before Lay, Heaney and Stephenson, Circuit Judges.

Heaney, Circuit Judge.

Defendant Ronald Calvert was convicted by a jury on seven counts of mail fraud in violation of 18 U.S.C. § 1341, four counts of fraud by wire in violation of 18 U.S.C. § 1343, and one count of conspiring to commit mail and wire fraud in violation of 18 U.S.C. § 371. The District Court sentenced him to a total of forty-five years imprisonment. We affirm.

Viewed in the light most favorable to the government, the evidence established the following facts. In the spring of 1972, the defendant approached an old acquaintance, Charles Hintz, and asked Hintz if he were interested in going "into business"

with him. In a series of meetings, the defendant informed Hintz that he wished to use Hintz as a "front man" in a scheme in which they would enter into a partnership with a businessman with an idea or invention, obtain key man and accidental death insurance on the businessman, and then cause his death for the purpose of collecting and sharing the proceeds. The defendant informed Hintz that he needed a "front man" because he had successfully used this ruse before and, hence, could not have his name listed as beneficiary on the policies. Hintz accompanied the defendant to several meetings with at least three potential business partners. During the process of sizing up these prospects, the defendant stressed to Hintz the health and insurability of the potential partner, stating that business acumen and the merits of the potential partner's product were not the most important considerations. By late spring of 1972, Hintz dropped out of the picture as a "front man."[1]

On May 24, 1972, the defendant's father, James Calvert, entered into a partnership agreement with Victor Null, an inventor who had designed a rotary engine and who was looking for financial backing. Under the partnership agreement, James Calvert was to supply the necessary funds and Null was to develop the engine. The partnership leased office space in East St. Louis, and Null began work there on a prototype.

During the next few months, the defendant obtained insurance policies on the life of Null with a total face value in excess of two million dollars.[2] The defendant's father, James Calvert,

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[1] In August of 1972, Hintz informed law enforcement officials that he believed that the defendant was involved in a scheme to defraud insurance companies.

[2] In May, 1972, the defendant contacted a local agent for Prudential Insurance Company and filled out an insurance application seeking $500,000 coverage on Null's life with James Calvert as the beneficiary. The defendant delivered a check for more than $10,000, signed by his father. The Prudential office in St. Louis mailed the application and medical examination forms to the home office in

became the beneficiary on two policies, worth $350,000 in the event of accidental death, but the premiums came from the defendant's funds by indirection. An additional $2,000,000 policy was owned by the partnership, and designated the partnership as beneficiary.

On November 1, 1972, the defendant went to the home of an acquaintance of twenty-five years, John Alsop, and offered to pay Alsop $5,000 if he would murder an inventor in East St. Louis. The defendant told Alsop that the inventor's wife wanted some "policies" cancelled, and that he wanted the inventor killed in the near future during a time when the defendant

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Houston [Count 1]. Before the check was deposited, the defendant contacted the local agent and declared that he wanted to add accidental death benefits. The agent informed the defendant that this was more than Prudential normally writes in accidental death, and that he would have to check with the home office in Houston. A new check was delivered to replace the prior one. The local office then mailed a letter to Houston advising the home office of the change in the application [Count 2]. The local agent learned that Prudential would not authorize such a large policy, and informed the defendant of this fact. The defendant then asked the agent to withdraw the application, because he did not want the application to be rejected. This was done.

The defendant thereafter met with a local agent for New England Mutual. The agent informed the defendant that the application would have to be accompanied by a letter containing information on the partnership, that both would have to be sent to underwriters, and that there were no underwriters in St. Louis. Such a letter was mailed to the home office in Massachusetts on July 10, 1972 [Count 3]. In analyzing the application, New England relied on the financial stability of the defendant's father; the defendant had deposited money into one of his father's bank accounts to bolster the appearance of stability. On July 19, 1972, the local agent received a mailgram from the New England home office, approving $150,000 business and $100,000 personal insurance on the life of Null [Count 4]. The local agent informed the defendant that New England had approved these lesser amounts, rather than the $500,000 requested, and that an application from Null himself would be needed for the personal insurance. The defendant subsequently accompanied Null to the local office, where the latter submitted an application for personal insurance in the amount of $100,000, with an accidental death benefit of $100,000. At the same time, Null assigned the personal policy to

would be in Florida. The defendant stated that he wanted Alsop to go over to the East St. Louis office early one morning and shoot the inventor in the head several times with a .22 or .25 caliber pistol, making it look "like it was done by one of the local colored persons." When Alsop balked, the defendant asked him to think it over. The next day, the defendant called from the partnership premises in Illinois to Alsop's residence in Missouri and asked Alsop if he had made up his mind.[3] Alsop

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James Calvert. This agreement was apparently not known to the home office until September. The premium check was signed by James Calvert. On July 24, 1972, the local agent mailed a letter to the home office in Massachusetts, advising them that the premium had been collected, and forwarding the application for personal insurance signed by Null [Count 5]. On September 1, 1972, the assignment and change of beneficiary form which Null had signed in the defendant's presence was mailed to the home office [Count 6].

On July 24, 1972, a new partnership agreement was reached, bringing in several new partners, including an attorney and a C.P.A. In early September, a separate agreement was signed by all the partners stating that the New England insurance belonged exclusively to James Calvert.

In August of 1972, the defendant contacted Bowes & Company, an insurance broker, and asked if it would consider writing a $2,000,000 accident policy on the inventor, with the partnership as the beneficiary. The company replied that it did not have authority to write such a policy, but that it would accept an application and submit it to qualified underwriters. The defendant filled out an application, prominently labeled "Lloyds London," and was told by company representatives that the application would be airmailed to London with a request for a "telex" reply. A letter and application were mailed to London [Count 7]. Upon receiving a telex reply from London, Bowes & Company sent a letter on September 8, 1972, to the partnership's attorney, with a copy to the defendant, informing them of the cost of the insurance and asking for confirmation of the order [Count 8]. On September 11, the defendant called Bowes & Company and told it to submit a firm order. The defendant was advised that a reply would be sent by telex to London, and the reply was sent [Count 9]. On September 13, Bowes & Company received a telex from London indicating "bound coverage" [Count 10].

[3] The interstate telephone call was the basis of Count 11. Telephone company records were introduced to establish that a call had been placed by an unknown party from the East St. Louis partnership office to Alsop's home in the early afternoon of November 2, 1972.

declined the offer, informing the defendant that it was not a question of money, but that he had a young daughter and wanted to "see her grow up."

On November 9, 1972, two days after the defendant had gone to Florida, Null's body was found in his East St. Louis workshop. He had been shot four times in the head with a .22 caliber firearm. There were no signs of forced entry, and nothing was reported missing, although the office had the appearance of having been ransacked. The murderer has never been found. Shortly after the murder, the defendant told Hintz to warn Alsop to keep his mouth shut if he did not wish to see his (Alsop's) daughter harmed. Subsequently, the defendant offered to give Hintz $100,000 tax-free "from our policy" if he would corroborate the defendant's deposition testimony to the effect that Hintz had expressed an interest in acquiring the engine.

**I. Authority of the Special Attorneys to Present the Case to the Grand and Petit Juries.**

There is no merit to the defendant's contention, raised for the first time more than six months after conviction, that the prosecuting attorneys were without authority to present the case to the grand and petit juries. Any objections to the validity of the indictment were waived when they were not presented by motion before trial. *See* Federal Rule of Criminal Procedure 12(b)(2); *Davis v. United States*, 411 U.S. 233, 236-237, 241 (1973). Even were we to relieve the defendant from the consequences of his waiver, we have squarely rejected the proposition that the type of authorizing letter employed here is insufficient to empower special attorneys of the Justice Department to conduct grand jury proceedings. *United States v. William Robert Wrigley*, No. 75-1235 (8th Cir. July . . , 1975); *United States v. Salvatore Ross Agrusa*, No. 75-1196 (8th Cir. July . . , 1975);

*United States v. Dominick DiGirlomo*, No. 75-1286 (8th Cir. July .., 1975). *Accord, In re Grand Jury Subpoena of Alphonse Persico*, No. 75-2030 (2nd Cir. June 19, 1975).

II. **Publicity.**

The defendant argues that he was deprived of a fair trial because of publicity occurring both before and during the trial.[4] While he has submitted a package of newspaper articles to this Court, he does not specify the manner in which they prejudiced him. On this appeal, he points to no instance in which the news accounts were anything other than factual, and he cites no instances in which the accounts went beyond the evidence presented to the jury. *Compare United States v. Pomponio*, 17 Cr.L. 2235 (4th Cir. June 3, 1975) (defendant demonstrated that specific newspaper articles contained in-court items from which the jury had been excluded). The defendant did not request a sequestered jury. He does not contend that the voir dire was in any respect inadequate, that any particular juror should have been stricken, or that any juror violated the court's repeated admonitions to avoid all news accounts of the trial. In short, his allega-

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[4] Prior to the return of the indictment, a radio and television station each indicated during news broadcasts that an indictment was imminent. Neither broadcast indicated who would be indicted. When the defendant sought to force disclosure of the source of this information, the trial court quashed the subpoena in the face of the newsmen's statement to the court that they would not comply. The defendant does not specify any prejudice stemming from the leak or from the quashing of the subpoena, but he implies that the indictment might have been dismissed if it were discovered that the source of the leaks was a Strike Force Attorney.

Assuming arguendo that the trial court abused its discretion in quashing the subpoena, and assuming that a Strike Force Attorney was indeed the source of the leak, we perceive no prejudice to the defendant stemming from the news report. In the absence of prejudice, the drastic sanction of dismissal of the indictment would not have been appropriate. *Cf. United States v. Abbott Laboratories*, 505 F.2d 565, 570-573 (4th Cir. 1974). Hence, the trial court's handling of the subpoena does not furnish grounds for reversal of the conviction.

tions of unfair publicity is limited to the general allegation that the media coverage was so pervasive as to create an "atmosphere" in which a fair trial was denied.

We have held on the issue of trial publicity, that

> * * * [e]ventually each case must be decided on the facts, and ordinarily the defendant has the burden of showing any essential unfairness in the adjudicatory process unless the totality of the circumstances raises the probability of prejudice. * * *

*United States v. McNally*, 485 F.2d 398, 402 (8th Cir. 1973), *cert. denied*, 415 U.S. 978 (1974) (footnote omitted).

We are convinced that the totality of the circumstances here do not raise the probability of prejudice. The trial judge instructed the attorneys not to add to the publicity with leaks, instructed the marshals to prevent pictures from being made of witnesses, ordered photographers to stay away from the area around the jury room, refused to provide the media with the names of the jurors, granted the defendant's request that portions of the transcript dealing with matters not occurring in open court be suppressed, and interrogated the jury to determine if any juror had disregarded his instructions to shun media coverage.

The defendant is not persuasive in his attempt to analogize the atmosphere of his trial to that in *Sheppard v. Maxwell*, 384 U.S. 333 (1966), *Estes v. Texas*, 381 U.S. 532 (1965), *Rideau v. Louisiana*, 373 U.S. 723 (1963), and *Irvin v. Dowd*, 366 U.S. 717 (1961). As the Supreme Court recently noted, each of those cases involved convictions which had been "obtained in a trial atmosphere that had been utterly corrupted by press coverage." *Murphy v. Florida*, 43 U.S.L.W. 4730, 4731 (U.S. June 16, 1975). We need not further detail the facts in those four cases, for the Supreme Court's discussion of them amply discloses that they do not call for a presumption of prejudice here.

## III. Sufficiency of the Evidence.

### A. The evidence regarding the use of the mails and wires.

The defendant attacks the sufficiency of the evidence on the mail and wire fraud counts in two respects.[5] First, he urges that the evidence was insufficient to support a finding that he "knowingly caused" any matter or thing to be delivered by mail or transmitted by wire. Second, he asserts that the evidence does not support a finding that the mailings and use of the wires were "for the purpose of executing" the scheme. We find the evidence sufficient in both respects.

It has long been clear that the mail fraud statute reaches schemes in which the defendant did not himself place any matter in the mails; it is sufficient to show that he "caused" the mailings. *See United States v. Brickey*, 426 F.2d 680, 684 (8th Cir.), *cert. denied*, 400 U.S. 828 (1970). The scope of the wire fraud statute is equally broad. *See United States v. Hancock*, 268 F.2d 205, 206 (2nd Cir.), *cert. denied*, 361 U.S. 837 (1959). The standard was set forth in *Pereira v. United States*, 347 U.S. 1, 8-9 (1954):

> * * * Where one does an act with knowledge that use of the mails will follow in the ordinary course of business, or where such use can reasonably be foreseen, even though not actually intended, then he "causes" the mails to be used. * * *

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[5] The defendant also claims that there was a fatal variance between the indictment and the proof, and that the prosecutor kept changing his theory of the fraudulent scheme. We cannot agree. Our review of the record leads us to conclude that the government's theory of guilt was consistently that the defendant had applied for insurance with the intention of causing the death of the insured. The court instructed the jury that, unless the intent to bring about Null's death was present when the applications were made, it must bring in a verdict of acquittal. The defendant was advised of this theory from the very beginning.

The District Court properly instructed the jury in accordance with this standard. The jury could properly conclude from the evidence that the mailings and wires between the local agents and the home offices were reasonably foreseeable.[6] *See United States v. Minkin*, 504 F.2d 350, 353 (8th Cir. 1974), *cert. denied*, 95 S.Ct. 1122 (1975) (upholding jury determination that a mailing of twelve miles between broker's office and insurance company was reasonably foreseeable); *Bannister v. United States*, 379 F.2d 750, 752-753 (5th Cir. 1967), *cert. denied*, 390 U.S. 927 (1968) (mailings from local insurance agent to home office reasonably foreseeable).

In support of his assertion that the mailings and use of the wires were not "for the purpose of executing the scheme," the defendant cites *United States v. Maze*, 414 U.S. 395 (1974). That case held only that, when the defendant had completed the scheme and received the benefits of it, any further mailing which served to allocate the loss between victims did not come within the purview of § 1341. Since the mailings and use of the wires here occurred before the scheme reached its hoped-for fruition, *Maze* and the other cases cited by the defendant are inapposite. As the Fifth Circuit declared in *Bannister v. United States*, *supra* at 753:

> The appellants' * * * assertion, that the mailings occurred subsequent to any misrepresentations they may have

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[6] Each mailing, although in furtherance of a single scheme, is a separate offense under the mail fraud statute. *See United States v. Anderson*, 466 F.2d 1360, 1361 (8th Cir. 1972); *United States v. Williams*, 424 F.2d 344, 351, *affirmed en banc*, 477 F.2d 1285 (5th Cir. 1970), *cert. denied*, 405 U.S. 954 (1972); *United States v. Eskow*, 442 F.2d 1060, 1064 (2nd Cir.), *cert. denied*, 398 U.S. 959 (1970); *Atkinson v. United States*, 344 F.2d 97, 98 (8th Cir.), *cert. denied*, 382 U.S. 867 (1965). The same is also true under the wire fraud statute. *See Henderson v. United States*, 425 F.2d 134, 138 n.4 (5th Cir. 1970). We are satisfied that the jury was properly instructed that each mailing or use of the wire must have been reasonably foreseeable, and that the evidence supports the jury's conclusions in this regard. *See* note 2, *supra*.

made to the Insurer and therefore were not incident to the execution of any essential part of the scheme but rather after the scheme had been fully executed, Kann v. United States, 1944, 323 U.S. 88, 65 S.Ct. 148, 89 L.Ed. 88, 157 A.L.R. 406; Parr v. United States, 1960, 363 U.S. 370, 80 S.Ct. 1171, 4 L.Ed.2d 1277, is patently without merit. This merely cleared the first hurdle in the inception of the scheme. The fulfillment of the fraud—acquisition of the proceeds—yet remained.

B. **Evidence of conspiracy.**

The defendant urges that there was no proof of "a combination of two or more persons," *Cross v. United States*, 392 F.2d 360, 362 (8th Cir. 1968), and that the government had, therefore, failed to make a submissible case on the conspiracy count. We reject that contention. The evidence permitted a finding that defendant's father, as well as an unknown murderer, were co-conspirators in the scheme.

IV. **Evidentiary Rulings.**

A. **Failure of the prosecutor to disclose inducements to government witnesses.**

The defendant claims that he was lied to when the government informed defense counsel that Hintz, Alsop, and Mrs. Alsop had been given no promises of immunity and no financial rewards, since those witnesses were in fact receiving relocation payments while held in protective custody. He asserts that the failure of the prosecutor to disclose such payments requires reversal of the conviction under the holdings in *Napue v. Illinois*, 360 U.S. 264 (1959); *Brady v. Maryland*, 373 U.S. 83 (1963); and *Giglio v. United States*, 405 U.S. 150 (1972).

We find no misrepresentation or nondisclosure. The afternoon prior to Hintz's testimony, the government informed defense counsel that no promises of immunity had been made and no benefits had been extended other than those normally "associated with witness protection." Defense counsel did not probe that area in cross-examining Hintz, but did reserve the right to recall him. During cross-examination of Alsop, defense counsel brought out the amount and duration of payments which he had received under the witness relocation program. The defense did not recall Hintz to the stand, but in closing argument, counsel stressed that "you can pretty well surmise that if they're paying John Alsop they're paying good old Charlie [Hintz] as well." Defense counsel was in no way misled on the subject of inducements, and in deciding not to recall Hintz to the stand, made a tactical decision not to inquire further into the area. The court permitted him to argue the issue to the jury, and there was no prejudice.

B. **Restrictions on the scope of the cross-examination of Hintz.**

The defendant claims that his inquiry in cross-examination of Hintz was improperly cut short in two areas: (1) as to whether the witness had ever violated the Mann Act; and (2) as to whether the witness had been arrested for child molestation. In both instances, although the court circumscribed the inquiry, it permitted questioning coextensive with the defendant's theories of admissibility.

The defendant urged that evidence on both subjects was relevant to the question of whether the government had offered any inducements of immunity to Hintz. The court indicated that it would allow defense counsel to ask Hintz if the government had in fact offered inducements of immunity. This was sufficient, under the defendant's theory of relevance, and there was no abuse of discretion in the court's order not to pursue the inquiry further.

The defendant contended that the evidence on child molestation arrests was relevant for the additional purpose of showing that Hintz's testimony that the defendant had tried to use him as a front man was implausible. The defendant claimed that he knew of Hintz's arrest record, and hence would not have suggested use of Hintz's name as beneficiary. The court permitted counsel to ask both Hintz and the defendant whether or not Hintz had told the defendant of such an arrest record, and also indicated that counsel could ask if Hintz had a reputation for such arrests. This line of questioning was adequate to establish the proposition which the defendant sought to prove. Accordingly, the court did not abuse its discretion in ruling that the existence *vel non* of the arrest was irrelevant and inadmissible.

C. **Evidence of "other crimes."**

The defendant claims that the government was improperly permitted to present certain evidence which was unduly prejudicial in that it tended to establish that he had committed other crimes not contained in the indictment. The objectionable evidence included:

(1) Testimony of Hintz, Beck, Held and Baker concerning the sizing up of the latter three individuals as prospective business partners, including the testimony of Held and Baker to the effect that the defendant had indicated a desire to insure their lives;

(2) Testimony of Mr. and Mrs. Alsop, relating the defendant's statement to Mr. Alsop that he had killed a prior business partner, Jack Edwards, is an "identical situation;"[7]

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[7] Alsop testified that, when he balked at the defendant's request that he murder Null, the defendant declared:

* * * "There's nothing to it."

* * * * * * * *

* * * "We had the identical situation with Mr. Edwards over there, Jack Edwards. * * * His old lady was pulling the rugs

(3) Testimony of four other witnesses and the introduction of several exhibits pertaining to the gunshot death of Edwards and the collection by the defendant of insurance proceeds as a consequence of that death.[8]

(4) Testimony of Walsh, a copartner in the rotary engine partnership, relating the defendant's statement to the partners, after the Null murder, that he had twice previously been a beneficiary on insurance policies on occasions when a partner or employer had been shot—once when Edwards was killed and once when a Mr. Schucardt had been wounded.[9]

Federal Rule of Evidence 404(b), which becomes effective on July 1, 1975, *see* Pub. L. No. 93-595 (January 2, 1975), declares:

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> out from under him * * *. I blew his fuck—I blew his head off right across the desk."

Mrs. Alsop corroborated this version of the facts on rebuttal, stating that she had overheard the defendant tell her husband:

> * * * "Man * * * there's nothing to it. * * * You know Edwards? * * * [T]here's nobody tripped over a cat * * * I took the shotgun myself and blew his head off across the desk.

[8] The government produced a diagram of the location of the Edwards shooting, a shotgun and shells found at the location (including a matching shell which had been found in the defendant's pocket), and court settlement documents indicating that the defendant had collected nearly $300,000 in insurance proceeds. Two police officers described the scene of the Edwards shooting, testified that the defendant was present, and stated that one Donald Deal told them that he had been holding the shotgun which went off when he tripped over a cat.

Edwards was shot on July 1, 1970, and the insurance settlement was reached in the summer of 1971. No one was ever prosecuted in the killing. Hintz testified that, when the defendant first approached him about a joint business venture, the defendant displayed a check for $300,000, which he explained was the after-tax profits from his latest business venture.

[9] No further evidence concerning the shooting of Schucardt was ever introduced.

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

This statement of the "other crimes" rule is consistent with the common law and with the decisions of this Circuit.[10] *See United States v. McGrady*, 508 F.2d 13, 19 (8th Cir. 1974); *United States v. Clemons*, 503 F.2d 486, 489 (8th Cir. 1974).

The admissibility of "other crimes" evidence in accordance with this rule is initially a matter within the sound discretion of the trial judge. *Cunha v. Brewer*, 511 F.2d 894, 900 (8th Cir. 1975). In exercising that discretion, the trial court must determine that: (1) the evidence is relevant for a purpose other

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[10] The "other crimes" or "character" rule has undergone a metamorphosis in most American jurisdictions from a rule of *inclusion* —the evidence is admissible unless its sole relevance is to the disposition of the defendant—to a rule of *exclusion*—the evidence is excluded unless it falls within a few specifically defined categories, primarily those enumerated in Federal Rule of Evidence 404(b). *See* Stone, *Exclusion of Similar Fact Evidence: America*, 51 HARV. L. REV. 988, 989 (1951); I WIGMORE ON EVIDENCE § 216 at 713 (3d ed. 1940). The change in emphasis is most likely due to an increased sensitivity to the dangers of such evidence. Nevertheless, admissibility of "other crimes" evidence cannot be a mechanical process. As we stated in *Cunha v. Brewer*, 511 F.2d 894, 900 (8th Cir. 1975):

> * * * The process * * * "is not merely one of pigeonholing, but one of balancing, on the one side, the actual need for the other-crimes evidence in light of the issues and the other evidence available to the prosecution, the convincingness of the evidence that the other crimes were committed and that the accused was the actor, and the strength or weakness of the other-crimes evidence in supporting the issue, and on the other, the degree to which the jury will probably be roused by the evidence to overmastering hostility." McCormick, [The Law of Evidence] § 190 at 453 [(2d ed. 1972)].

*See also United States v. Clemons*, 503 F.2d 486, 489-491 (8th Cir. 1974).

than showing the character or disposition of the defendant; (2) the proof that the acts were committed by the defendant is "clear and convincing;" and (3) the probative value of the evidence outweighs the danger of prejudice to the defendant.[11] *See United States v. Gocke*, 507 F.2d 820, 825 (8th Cir. 1974); *United States v. Clemons, supra*, at 489. If the evidence is admitted, the court should give a limiting instruction, informing the jury of the narrow purpose for which it has been admitted. *See Goodman v. United States*, 273 F.2d 853, 857 (8th Cir. 1960); *King v. United States*, 144 F.2d 729, 732 (8th Cir. 1944), *cert. denied*, 324 U.S. 854 (1945).

We conclude that the trial court did not abuse its discretion in admitting the disputed evidence. The testimony of Hintz, Beck, Held and Baker, concerning the defendant's business negotiations with the latter three individuals, was not evidence of "other crimes," but rather described integral parts of the

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[11] The rule is based on three dangers in the presentation of "other crimes" evidence. First, it is feared that

> * * * a jury might overestimate the probative value of such evidence by assuming that merely because the defendant has committed crimes before, he is likely to be guilty of the offense charged. * * *

Case Note, 87 HARV. L. REV. 1074, 1076 (1974). Second, is

> * * * the recognized tendency of men to punish a bad man now that he has been caught, even though his guilt on this occasion has not been satisfactorily established. * * *

Morgan, BASIC PROBLEMS OF EVIDENCE 200 (1962). And finally, it is felt that it is unfair to require a defendant to defend against and disprove crimes for which he has never been charged or indicted.

Yet there is a tension in the rule, for evidence probative of material facts at issue may incidentally implicate the defendant in other crimes, and to exclude such evidence merely because it tends to show that the defendant is a bad man would "handicap the State in its prosecution of the man of cumulative criminal daring." I WIGMORE, *supra* § 216 at 712. The true purpose of the rule must thus be "to impel to a greater caution in determining * * * relevancy in a given instance." *Id.* at 717.

very crime for which he was convicted.[12] *See United States v. Cochran*, 475 F.2d 1080, 1082-1083 (8th Cir.), *cert. denied*, 414 U.S. 833 (1973); *United States v. Gallington*, 488 F.2d 637, 641 (8th Cir. 1973), *cert. denied*, 416 U.S. 907 (1974). The defendant's search for an appropriate victim, analogous to the "casing" of several banks before robbing the most suitable target, was properly admitted as evidence of preparation and planning. *See* Federal Rules of Evidence 404(b).

Similarly, the testimony of Walsh, relating the defendant's statements to the partners after the Null murder, was evidence of the defendant's conduct in carrying out the very crime charged. In disclosing and giving innocent explanations for the Edwards and Schucardt shootings, the defendant may have been attempting to enlist the aid of the partners in an anticipated fight to recover the proceeds on the Null policies from reluctant insurers. He may also have been seeking to assuage any suspicions which might later arise and to cover up his role in Null's death. The government did not seek to prove that the statements were true, but only that they had in fact been made. As such, the statements were "verbal acts" made in furtherance of the fraudulent scheme and were admissible on that ground.[13] *See* VI WIGMORE ON EVIDENCE §1766 at 177-180 (3d ed. 1940).

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[12] The defendant did not object at trial to the testimony of Hintz, Beck, Held or Baker on the ground that such testimony was evidence of "other crimes" or was probative solely of the defendant's character. That contention is raised for the first time on appeal.

[13] Perhaps as a technical matter, the court should have instructed the jury that the statements were being received only as evidence of conduct, and should not be taken to establish that the defendant had in fact been a beneficiary in the past. However, the defendant did not request such a limiting instruction and, for obvious reasons, did not contest the truth of the exculpatory matter contained in the statements. Moreover, there was ample corroborative evidence—independently admissible—to establish that he had been beneficiary on the Edwards policy. Under the circumstances, the failure to give a limiting instruction was not prejudicial.

The testimony of both Mr. and Mrs. Alsop relating the defendant's statement that he had personally shot Edwards was likewise admissible. The defendant was attempting to induce Alsop to become an accomplice, and the making of the statement was as much an act in furtherance of the crime as the defendant's offer to pay Alsop $5,000 to murder Null. As such, it was admissible as a verbal act.[14]

The trial court ruled that the facts surrounding the Edwards shooting and the proof of the defendant's collection of the proceeds were relevant to a material fact at issue: whether the defendant intended to defraud the insurance companies when he applied for and purchased the insurance on Null's life. We agree.[15] The court instructed the jury that the government had the burden of proving that the defendant intended to defraud the insurance companies at the time when he caused the use of the mails and wires. We have previously held in mail fraud

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[14] The defendant did not object to this testimony at trial, did not claim that it was inadmissible as evidence of "other crimes," and did not request that the court give any instruction limiting its use. Had the defendant expressed his objections in a timely fashion, the court could have contemplated the option of instructing the jury that the testimony was admitted only for the purpose of establishing that the statement had been made, and not for the purpose of showing that the statement was true and that the defendant had in fact killed Edwards. In light of our conclusion that the court properly admitted evidence concerning the circumstances of Edwards' death, *see* pp. A-17-A-19, *infra*, we cannot say that it was plain error for the court to fail to so limit the admissibility of the Alsops' testimony. If the defendant's boast that he had killed Edwards was true, this was highly probative of the intent with which he applied for insurance on Null's life, and also helped to explain his motivation for devising the scheme in the manner chosen. *See* note 15, *infra*.

[15] We conclude that the evidence was also admissible for the purpose of showing the defendant's motive for devising the scheme in the manner chosen. The disputed evidence helped clarify why he was willing to split his profits with a "front man," rather than himself becoming the sole copartner and named beneficiary. It also helped to explain why the defendant may have decided to hire a killer and create the alibi of a trip to Florida, rather than commit the murder himself.

cases that evidence of other offenses by the defendant is admissible to show criminal intent where the other offenses are similar to and not too remote in time from the offense charged. *See, e.g., United States v. Bessesen,* 433 F.2d 861, 864 (8th Cir. 1970); *Goodman v. United States, supra* at 857; *King v. United States, supra* at 732-733; *Samuels v. United States,* 232 Fed. 536, 542 (8th Cir. 1916). Cases in other Circuits are to the same effect. *See, e.g., United States v. Mancuso,* 444 F.2d 691, 695 (5th Cir. 1971); *United States v. Larsen,* 441 F.2d 512, 514 (9th Cir. 1971); *United States v. Hutul,* 416 F.2d 607, 624 (7th Cir. 1969), *cert. denied,* 396 U.S. 959 (1970); *New England Enterprises, Inc. v. United States,* 400 F.2d 58, 70 (1st Cir. 1968), *cert. denied,* 393 U.S. 1036 (1969); *United States v. Deaton,* 381 F.2d 114, 117-118 (2nd Cir. 1967).

Having properly concluded that the evidence of the circumstances of Edwards' death was relevant to the issue of intent, the trial court did not abuse its discretion in determining that the probative value of the evidence outweighed its prejudicial effect. The jury had already heard, without objection, the defendant's own words in which he boasted that he had personally shot Edwards. Under the circumstances, any additional prejudice which would flow from laying before the jury an accurate account of the Edwards shooting was minimal. Nor was there any doubt that the basic facts testified to by the police officers and attested to by the document proving collection of insurance proceeds were established by "clear and convincing" evidence. And the larger fact which the government was trying to establish—that the defendant had previously defrauded an insurance company under like circumstances by causing the death of Edwards—was supported by the admission of the defendant to Alsop.

Finally, the court properly instructed the jury that it was to consider the evidence solely as it showed the requisite intent, and further instructed that it could only consider the

evidence after it had concluded from independent evidence that the other elements of the offense had been proven. *See New England Enterprises, Inc. v. United States, supra* at 70; *Goodman v. United States, supra* at 857; *King v. United States, supra* at 732-733; *Samuels v. United States, supra* at 542.[16]

D. **Attorney-client privilege.**

John Walsh, one of the partners, was permitted to testify, over objection, about a conversation held in his home within a week of Null's death, at which four of the partners and the defendant were present. In the course of that meeting, the defendant informed the partners that he had twice previously been a named beneficiary on insurance policies on occasions when the insured had been shot, and he gave innocent explanations for the shootings. The defendant contends that the testimony should have been excluded on the ground of attorney-client privilege,[17] because one of the four partners present, Judge Gaertner, was an attorney who not only performed legal work for the partnership, but had also advised the defendant to speak freely to the police following Null's death.[18]

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[16] At least one court has gone further than our Court, and has permitted proof of similar incidents to be admitted to establish the corpus delicti. *See United States v. Woods,* 484 F.2d 127, 136 (4th Cir. 1973), *cert. denied,* 415 U.S. 979 (1974) (murder), *noted in* 87 HARV. L. REV. 1074 (1974). *See generally* Stone, *supra* note 10 at 1018.

[17] The defendant alternatively claims that this testimony was inadmissible as evidence of "other crimes." *See* pp. A-13-A-14, A-15-A-17, *supra.*

[18] The court had previously excluded the testimony of Judge Gaertner, when he was asked to describe the same conversations, because it concluded that Judge Gaertner stood in an attorney-client relationship to the defendant. While agreeing with the prosecution that a strong argument could be made that the meeting at Walsh's home was strictly a business discussion, in which Judge Gaertner was

Assuming arguendo that the defendant's statements during the meeting were confidential communications between client and attorney, we are satisfied that the conversations were properly admitted. Federal Rule of Evidence 501 provides that questions of privilege are to be governed by the common law, in the absence of a Supreme Court rule, federal statute, or constitutional provision. At common law, it is settled that confidential communications from client to attorney are not privileged if the court concludes that the evidence warrants a finding that the communications were made for the purpose of obtaining aid in the commission of future criminal acts.[19] *See United States v. Goldenstein*, 456 F.2d 1006, 1011 (8th Cir. 1972); *United States v. Bartlett*, 449 F.2d 700, 704 (8th Cir. 1972), *cert. denied*, 405 U.S. 932 (1972); *United States v. Billingsley*, 440 F.2d 823, 827 (7th Cir.), *cert. denied*, 403 U.S. 909 (1971); VIII WIGMORE ON EVIDENCE § 2298 (McNaughton Rev. 1961). *See also Clark v. United States*, 289 U.S. 1, 15 (1933) (dictum). "The privilege takes flight if the relation is abused." *Id.* In applying this exception to the doctrine of privilege, it is the client's purpose which is controlling, and it matters not that the attorney was ignorant of the client's purpose in making the statements. *See id.; United States v. Aldridge*, 484 F.2d 655, 658 (7th Cir. 1973), *cert. denied*, 415 U.S. 921 (1974).

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acting as a partner, rather than as an attorney, the court declared that it would rather err on the side of caution. In our view, it would have been proper to admit Judge Gaertner's testimony as to what was said at the meeting in Walsh's home.

[19] Further evidence of the common law is found in ALI, MODEL CODE OF EVIDENCE § 212 (1942):

> No person has any privilege under Rule 210 [Communication Between Lawyer and Client] if the judge finds that sufficient evidence, aside from the communication, has been introduced to warrant a finding that the legal service was sought or obtained in order to enable or aid the client to commit or to plan to commit a crime or a tort.

*Accord*, Uniform Rule of Evidence 26(2) (1953).

The evidence warranted a finding that the defendant, by his statements, sought to enlist the aid of the partners—attorney and non-attorney alike—in carrying to its fruition the scheme to defraud the insurance companies. In light of the anticipated reluctance of Lloyds of London to pay over the proceeds on the two million dollar policy, the defendant would get his share of those fruits of the scheme only if the partnership (the beneficiary) vigorously pressed its rights under the policy. The defendant's disclosure and innocent explanation of the prior incidents was a means of preparing the partners for the shock of battle and stiffening their resolve to fight. Hence, the statements were not an instance of mere concealment of past wrongdoing, as where a client falsely tells his attorney that he did not commit a past criminal act. *See* VIII WIGMORE, *supra*, § 2298 at 572-573. Rather, the statements were an inducement to future action in which the partners would become the defendant's unwitting pawns in playing out the last act of the fraud. There was no error in the failure to exclude Walsh's testimony.

E. **Hearsay testimony by Mrs. Null.**

Over objections, the widow of the deceased inventor was permitted to testify that, shortly before the murder of her husband, they had a series of conversations in which Null declared that he intended to speak to the defendant about cancelling the insurance and getting out of the partnership. The defendant urges that this was inadmissible as hearsay. We do not agree.

The evidence was admitted for the purpose of showing that it was likely that Null had in fact approached the defendant and sought to back out of the partnership and cancel the insurance; in other words, that he had acted in conformity with his expressed intentions. Whether he had so acted was a ma-

terial fact since, if true, it would establish the immediate motivation for the defendant's visit to Alsop. It would also corroborate Alsop's testimony that the defendant had stated that the shooting must be accomplished quickly because the victim "wanted to cancel the policies or get out." The government properly anticipated that the defendant would place this material fact in issue by denying that Null had expressed any such desire to him and by denying Alsop's testimony.

A declarant's out-of-court statement of intention is admissible to prove that the declarant subsequently acted in conformity with that intention, if the doing of that act is disputed material fact.[20] *Mutual Life Insurance Co. v. Hillmon*, 145 U.S. 285 (1892); Federal Rule of Evidence 803(3). *See also* McCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 295 (2d ed. 1972); Tribe, *Triangulating Hearsay*, 87 HARV. L. REV. 957, 969-971 (1974); Maguire, *The Hillmon Case—Thirty-three Years After*, 38 HARV. L. REV. 709 (1925). Mrs. Null's testimony as to her husband's expressed intention was properly admitted for this purpose.

F. **Government Exhibit 11.**

Government Exhibit 11 was an "office reference sheet" used by the Prudential Insurance Company home office in handling the father's (James Calvert's) application for insurance on Null's life. An underwriter for Prudential, Mrs. Flynn, testified that the form was maintained in the regular course of business for each application for insurance exceeding $50,000, and that she

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[20] Although the Federal Rules of Evidence do not limit the admission of such evidence to instances where the declarant is unavailable, some commentators have urged that the hearsay exception should be so limited. *See, e.g.*, McCORMICK, HANDBOOK ON THE LAW OF EVIDENCE § 295 at 698 (2d ed. 1972). Since Null was deceased, the evidence would have come in even under this more restricted view.

had initiated this particular form. The form, which contained numerous entries by various employees of Prudential, was used to route the file to the appropriate employees and to maintain a record of its progress.

The defendant contends that the exhibit was not admissible under the "business records statute," 28 U.S.C. § 1732, because it was not a memorandum or a recording of "any act, transaction, occurrence, or event." He objects particularly to the final entry, made by Mrs. Flynn, which reads:

> 7/7 Mrs. Phillips—Pls send rej. letter to Mr. Calvert per above. MEF

He urges that it was prejudicial to introduce this notation because the jury would use it to infer that the Calverts had been notified of rejection by Prudential—a fact which defendant denied—and had knowingly misrepresented this fact to New England. We have no doubt that the disputed notation, recording the decision to reject the defendant's application and the corresponding direction to write a letter so advising him, recorded an "act" or "event" within the meaning of the statute.

The defendant further contends that the exhibit was inadmissible because it contained "hearsay, opinions, surmise, unsubstantiated reports, and other non-facts." Federal Rule of Evidence 803(6) provides that opinions of an employee recorded in the regular course of business are admissible

> * * * unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. * * *

And the statute expressly provides that the

> * * * lack of personal knowledge by the entrant or maker, may be shown to affect [a business record's] weight, but such circumstances shall not affect its admissibility.

28 U.S.C. § 1732(a). The admission of business records under the statute is a matter within the discretion of the trial court. *See Hanley v. United States*, 416 F.2d 1160, 1168 (5th Cir. 1969), *cert. denied*, 397 U.S. 910 (1970). We find no abuse of discretion with respect to the admission of Government Exhibit 11.

G. **Pictures of the victim's body.**

The defendant objected to the introduction of two black and white photographs, taken at the scene of the slaying, showing the victim lying face down in a pool of dried blood with the pockets of his trousers pulled inside out. Various objects were depicted, scattered around the body. The government contends that it was proper for the court to admit the pictures, for they tended to support the testimony of Mr. and Mrs. Alsop that the defendant wanted someone to kill Null and make it look like a robbery. The defendant, on the other hand, urges that it was not necessary to introduce the pictures to establish the fact that the murder scene had been made to appear as if robbery were the motive; not only did police officers testify about the condition of the body and scene of the crime, but the defendant never disputed the physical circumstances of Null's death.

We agree with the defendant that the photographs should have been excluded as irrelevant. Since the jury was not required to find beyond a reasonable doubt that the defendant had in fact caused Null's death, but only that he intended to do so, the probative value of this cumulative evidence as to the manner of Null's death was very slight. *Compare United States v. Hoog*, 504 F.2d 45, 49-50 (8th Cir. 1974), *cert. denied*, 95 S.Ct. 1349 (1975); *United States v. Delay*, 500 F.2d 1361, 1366 (8th Cir. 1974). Nevertheless, the photographs were cumulative. A great deal of other evidence about the circumstances of Null's death, including the testimony of police officers, came

in without any objection. In light of the fact that this other evidence was already before the jury, we are convinced that the verdict would not have been altered by the exclusion of the two photographs. The other evidence of the defendant's guilt was strong and convincing. *See* pp A-1-A-6 and note 2, *supra*. The abuse of discretion in permitting the photographs to be admitted was "harmless error." *See Kotteakos v. United States*, 328 U.S. 750, 764-765 (1946). *Cf.* 28 U.S.C. § 2111.

H. **Rebuttal testimony by Mrs. Alsop.**

While conceding that the scope of rebuttal is a matter for the sound discretion of the trial court, *see, e.g., United States v. Armstrong*, 462 F.2d 408, 411 (8th Cir. 1972), the defendant urges that it was reversible error for the court to permit the rebuttal testimony of Mrs. Alsop. He asserts that her testimony was merely cumulative of that of her husband, and the government's failure to call her to the stand during its case in chief should have precluded her testimony after the defense had rested.

The mere fact that testimony could have been admitted on direct does not preclude its admission on rebuttal.[21] *See United States v. Pennett*, 496 F.2d 293, 299 (10th Cir. 1974); *United States v. Marsh*, 451 F.2d 219, 220-221 (9th Cir. 1971). Nevertheless, courts disfavor the deliberate tactic of "lying in the weeds" in anticipation of an ambush, and it is within a trial

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[21] * * * It may be assumed that the testimony would have been proper for the case in chief. But certain testimony may be proper both in chief and in rebuttal. The offering of the testimony at the beginning may not seem necessary at the moment, and while prosecutors have a duty to play fair with defendants, it is not unfair to offer testimony on rebuttal which is proper rebuttal, although it might have been offered in chief. * * *

*Samish v. United States*, 223 F.2d 358, 365 (9th Cir.), *cert. denied*, 350 U.S. 848 (1955).

court's discretion to exclude rebuttal if it concludes that the prosecution has acted unfairly. In this instance, we find no abuse of discretion in permitting the testimony. Mrs. Alsop was in the protective custody of the government. During the case in chief, her testimony would have been merely cumulative of that of her husband, and the prosecution may have delayed calling her to the stand in the hope that her testimony would not be needed. However, after the defendant had presented his case, including his contention that Alsop was not being truthful about the content of their talks, it was appropriate for the government to rebut that claim by putting Mrs. Alsop on the stand to testify as to what she had overheard. *See Lake v. United States*, 302 F.2d 452, 454-455 (8th Cir. 1962).

V. **Jury Instructions.**

The defendant complains of the court's failure to give three proffered instructions. We find no error in this regard. The defendant's proposed instruction number 12-A would have required the jury to find "that the defendant specifically contemplated" the use of the mails or wires, and that "without such use * * * the alleged scheme could not have succeeded." Our Court has recently reiterated the Supreme Court's holding that that is not the proper standard of law:

> * * * [I]t is not a *sine qua non* of the statutory offense that there be negation of means of communication other than the mails. The defendant argues that the checks, for example, "could just as well have been hand carried to Eugene Britton as mailed," or, we add, that conceivably railway express could have been used, or a parcel delivery service. But the test, under the statute, is realistic, not fanciful. "It is not necessary," held the Supreme Court in Pereira v. United States, 347 U.S. 1, 8-9, 74 S.Ct. 358, 98 L.Ed. 435 (1954), "that the scheme contemplate the use

> of the mails as an essential element," but merely that it be "incident to an essential part of the scheme," and that "such use can reasonably be foreseen, even though not actually intended."

*United States v. Britton*, 500 F.2d 1257, 1259 (8th Cir. 1974) (footnote omitted).

The defendant's proposed instruction number 13 would have told the jury that they must disregard the defendant's acts in concealing his identity from the insurance companies and in concealing from the companies his financial backing of his father's venture. We find no error in the court's refusal to give the instruction. The concealment was a vital part of the fraudulent scheme in light of the fact that the defendant had previously collected proceeds under similar circumstances and in light of his statement to Hintz that he needed a "front man" because he had used the ruse in the past.

The defendant's proposed instruction number 15 would have required the jury to find that he "had the intent to be responsible for or participate in the murder of Victor Null." The court did give this instruction at least twice in slightly modified form—once for the conspiracy count and once for the substantive counts. Indeed, in the latter instance, the modified instruction was even more favorable to the defendant, since the court told the jury that it could convict only if it found that the defendant had the intent to bring about Null's death at the time of each use of the mails or wires. There is no merit to the defendant's claim that his proposed instruction number 15 was wrongfully withheld.

## VI. The Sentencing Process.

### A. Failure to disclose the presentence report.

The District Court rejected the defendant's request that the presentence report be made available to him. The court did give a rough oral synopsis of the contents,[22] declaring that they were "innocuous," and that the report contained no meaningful information other than that which had already been brought out at trial.

There is a difference of opinion among the members of this Court as to how far a sentencing judge should be required to go in disclosing to a defendant the presentence report or its contents. *Compare United States v. Dace*, 502 F.2d 897, 899-901 (8th Cir. 1974), *cert. denied*, 42 L.Ed.2d 820 (1975) *and United States v. Schrenzel*, 462 F.2d 765, 775 (8th Cir.), *cert. denied*, 409 U.S. 984 (1972) *with United States v. Dace, supra* at 901-902 (Lay, J., dissenting) *and United States v. Schrenzel, supra* at 775-777 (Heaney, J., dissenting). The immediate evil criticized by the dissenters in those cases was the failure of the sentencing judge to disclose the substance of the report, includ-

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[22] The court stated:

> * * * [T]he pre-sentence report indicates the circumstances; that is, the dates of the trial, outlines the Indictment, it outlines the official version by merely saying the Court is already fully aware of the circumstances of this offense after five weeks of trial. There is indication that the defendant continued to maintain his innocence when interviewed.
>
> The prior record is minor; traffic violations, of which the Court takes no concern of any kind. The family history is outlined and contains no indication of any prior record or anything like that and it's nothing—home and neighborhood, the education, the religion, the interest and activities, employment. In fact, the pre-sentence report does not even mention many of the things that were brought out in trial. * * * In other words, the pre-sentence report insofar as anything negative other than the information which came out in trial is, I would say, innocuous.

ing any derogatory information, and the consequent lack of opportunity to respond to and refute such material. The dissenters urged that, in sanctioning total non-disclosure of the report *or* its substance, the majority violated the principle, announced in *United States v. Carden*, 428 F.2d 1116, 1118 (8th Cir. 1970), and reaffirmed in *United States v. Dace*, *supra* at 908, that

> It is *always* advisable for the trial judge to at least state on the record the various factors he has taken into consideration in rendering his sentence. * * *

(Emphasis supplied).

Here, the sentencing judge did disclose the substance of the presentence report, and we have determined from our independent review of the report that his disclosure was accurate. While, in our view, it may have been preferable for him to have disclosed the report itself, the defendant was not prejudiced by the approach taken, since the sentencing judge did not rely on any adverse information which had not been presented and open for refutation at the trial. Under the circumstances, we cannot say that the sentence was invalid due to the manner in which the report was handled.

B. **Excessiveness of the sentence.**

The defendant's final contention is that the forty-five-year sentence imposed by the court was excessive. He urges that, since he was convicted of only one scheme or course of conduct, the sentence should be vacated and remanded with instructions to the court to resentence the defendant to a total term not in excess of the five-year maximum for violation of the mail or wire fraud statutes. This contention is utterly without merit.

It is well settled that each use of the mails is a separate offense under the mail fraud statute, notwithstanding the fact

that the defendant may have been engaged in one fraudulent scheme. *See, e.g., Badders v. United States*, 240 U.S. 391, 394 (1916); *United States v. Ashdown*, 509 F.2d 793, 800 (5th Cir. 1975); *United States v. Anderson*, 466 F.2d 1360, 1361 (8th Cir. 1972); *United States v. Dreer*, 457 F.2d 31, 34 (3rd Cir. 1972).[23] The same is true of the use of the wires under the wire fraud statute. *See Henderson v. United States*, 425 F.2d 134, 138 n.4 (5th Cir. 1970). It is also well settled that cumulative punishment may be imposed for a conspiracy and for the substantive offense. *See Ianneli v. United States*, 43 L.Ed. 2d 616, 623 (1975). The defendant was convicted of twelve counts, each of which carried a maximum possible punishment of five years imprisonment. Hence, his forty-five-year sentence was well within the statutory maximum.

The rule in this Circuit is that

> * * * "A sentence imposed by a federal district judge, if within statutory limits, is generally not subject to review." United States v. Tucker, 404 U.S. 443, 447, 92 S.Ct. 589, 591, 30 L.Ed.2d 592 (1972). * * *

*Woosley v. United States*, 478 F.2d 139, 141 (8th Cir. 1973) (en banc). However, we do

> * * * possess the power to review the severity of a criminal sentence within narrow limits where the court has manifestly or grossly abused its discretion. * * *

*Id.* at 147.

We conclude, on the basis of all the evidence adduced at trial, that the sentence imposed by the District Court was not excessive as a manifest or gross abuse of discretion. The defendant stood convicted of a coldblooded scheme, involving the stalking and selecting of a victim with the intention of

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[23] *See also* note 6, *supra*.

murdering him for the purpose of obtaining money. We cannot say that the sentence imposed was "manifestly disproportionate to the nature of the crime." *Woosley v. United States, supra* at 148. *Cf. United States v. Smallwood,* 443 F.2d 535, 543 (8th Cir.), *cert. denied,* 404 U.S. 853 (1971) (upholding convictions of thirty-five and twenty years for mail fraud violations which did not involve loss of life); *United States v. Delay, supra* at 1368 (upholding one hundred-year sentence for a "heinous crime" involving bank robbery and murder). *But see United States v. Mackay,* 491 F.2d 616, 624-625 (10th Cir. 1973), *cert. denied,* 416 U.S. 972 (1974) (finding fifteen consecutive sentences under the mail fraud statute to be "excessive").

The conviction and the sentence imposed by the District Court are affirmed.

A true copy.

Attest:

*Clerk, U. S. Court of Appeals, Eighth Circuit.*

## APPENDIX B

### Judgment

United States Court of Appeals
For the Eighth Circuit

September Term, 1974

| | |
|---|---|
| No. 74-1716 | |
| The United States,<br>Appellee,<br>vs. | Appeal from the United States District Court for the Eastern District of Missouri |
| Ronald F. Calvert,<br>Appellant,<br>and | |
| James Henry Calvert. | |

This cause came on to be heard on the original files of the United States District Court for the Eastern District of Missouri and briefs of the respective parties and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court that the judgment and sentence of the said District Court in this cause be and the same is hereby affirmed.

August 25, 1975

A True Copy.

Attest: Robert C. Tucker
(Seal) Clerk, U.S. Court of Appeals, 8th Circuit

## APPENDIX C

United States Court of Appeals
For the Eighth Circuit

September Term, 1974

74-1716

The United States,
Appellee,
vs.
Ronald F. Calvert,
Appellant.

Appeal from the United States District Court for the Eastern District of Missouri

The Court having considered petition for rehearing en banc filed by counsel for appellant and, being fully advised in the premises, it is ordered that the petition for rehearing en banc, be, and it is hereby, denied.

Considering the petition for rehearing en banc as a petition for rehearing, it is ordered that the petition for rehearing also be, and it is hereby, denied.

September 24, 1975

# APPENDIX D

## TABULATION OF SENTENCES

(Tr. 2230-2234)

| Count | Charge | Date of Violation | Insurance Company | 5 Years Consecutive or Concurrent |
|---|---|---|---|---|
| 1 | Mail fraud | 5/22/72 | Prudential | Consecutive to Count 2 |
| 2 | Mail fraud | 5/26/72 | Prudential | Consecutive to Count 5 |
| 3 | Mail fraud | 7/10/72 | New England | Concurrent with Count 7 |
| 4 | Wire fraud | 7/19/72 | New England | Concurrent with Count 6, Consecutive to Counts 3 and 7 |
| 5 | Mail fraud | 7/24/72 | New England | Consecutive to Count 11 |
| 6 | Mail fraud | 9/ 1/74 | New England | Concurrent with Count 4, Consecutive to Counts 3 and 7 |
| 7 | Mail fraud | 9/ 1/72 | Lloyds | Concurrent with Count 3 |
| 8 | Mail fraud | 9/ 8/72 | Lioyds | Concurrent with Count 12, Consecutive to Counts 4 and 6 |
| 9 | Wire fraud | 9/11/72 | Lloyds | Consecutive to Counts 3, 4, 6, 7, 8 and 12 |
| 10 | Wire fraud | 9/13/72 | Lloyds | Consecutive to Count 9 |
| 11 | Wire fraud | 11/ 2/72 | None (telephone call) | Consecutive to Count 10 |
| 12 | Conspiracy | 4/ 1/72 to 11/ 8/72 | All three | Concurrent with Count 8, Consecutive to Counts 4 and 6 |

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# In the Supreme Court of the United States

OCTOBER TERM, 1975

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No. 75-750

RONALD F. CALVERT, PETITIONER

*v.*

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT*

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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### OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 523 F.2d 895.

### JURISDICTION

The judgment of the court of appeals was entered on August 25, 1975 (Pet. App. B). A timely petition for rehearing, with suggestion for rehearing

*en banc*, was denied on September 24, 1975 (Pet. App. C). On October 15, 1975, Mr. Justice Blackmun extended the time within which to file a petition for a writ of certiorari to November 24, 1975. The petition was filed on November 21, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

**QUESTIONS PRESENTED**

1. Whether the Department of Justice attorney who presented the case to the grand jury lacked proper authorization to appear before that body, thus rendering the resulting indictment invalid.

2. Whether the prosecution failed to disclose subsistence payments it had made to a government witness who had been relocated to protect him.

3. Whether the mailings and use of the wires were sufficiently related to the fraudulent scheme to bring petitioner's conduct within the statutes, and if they were, whether the court erred by refusing to give petitioner's proposed instruction regarding the required nexus between the mailings and use of wires and the scheme.

4. Whether evidence of prior crimes and activities of petitioner suggesting criminality was improperly admitted.

5. Whether certain hearsay testimony should have been excluded.

6. Whether publicity occurring before and during trial deprived petitioner of a fair trial.

7. Whether the sentence was excessive.

## STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Missouri, petitioner was convicted on seven counts of mail fraud (18 U.S.C. 1341), four counts of fraud by wire (18 U.S.C. 1343), and one count of conspiring to commit mail and wire fraud (18 U.S.C. 371). He was sentenced to nine consecutive terms of five years imprisonment (Tr. 2230-2234).[1] The court of appeals affirmed in a thorough opinion on which, in large measure, we rely (Pet. App. A).

In the spring of 1972, petitioner asked an old acquaintance, Charles Hintz, if he were interested in going "into business" with him (Hintz Tr. 4, 11-13).[2] In a series of meetings, petitioner informed Hintz that he wished to use him as a "front man" in a scheme that worked in the following way. Petitioner and Hintz would enter into a partnership with a businessman who had an idea or an invention; they would obtain key man and accidental death insurance on the businessman and then cause his death for the purpose of collecting and sharing the pro-

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[1] Three other five-year prison terms were made concurrent with the nine consecutive five-year terms.

[2] References to nine consecutively paginated trial transcript volumes will be designated "Tr." followed by the appropriate page. References to separately paginated trial transcript volumes will be prefaced by the name "Alsop," "Null," or "Hintz" to indicate the witness whose testimony is contained in the volume. Exhibits will be referred to by indicating the party who offered them in evidence, followed by "Exh." and the appropriate number.

ceeds of the insurance policies. (Hintz Tr. 12-13, 18-21). Petitioner informed Hintz that he needed a "front man" because he had successfully used this scheme before and, hence, could not have his name listed as beneficiary on the policies (Hintz Tr. 21).

Hintz accompanied petitioner to several meetings with at least three potential business partners (Hintz Tr. 23-32, 33-34). During the process of sizing up these prospects, petitioner stressed to Hintz that the health and insurability of the potential partner was more important than was his business acumen or the merits of his idea or invention (Hintz Tr. 31-32). By late spring of 1972, Hintz dropped out of the picture as a "front man." [3]

As a result of petitioner's efforts, petitioner's father, James Calvert, entered into a partnership agreement with Victor Null, an inventor who had designed a rotary engine and who was looking for financial backing. Under the partnership agreement, James Calvert was to supply the necessary funds and Null was to develop the engine (Tr. 40-47; Gov't. Exh. 34). The partnership leased office space in East St. Louis, and Null began work there on a prototype (Tr. 902-905, 912-915; Gov't. Exh. 35).

During the next few months, petitioner obtained insurance policies on the life of Null with a total face value in excess of two million dollars. James Calvert became the beneficiary on two policies, worth

[3] In August of 1972, Hintz informed law enforcement officials that he believed petitioner was involved in a scheme to defraud insurance companies (Hintz Tr. 184; Ct. Exhs. 56, 58).

$350,000 in the event of accidental death; the premiums came from petitioner's funds. An additional $2,000,000 policy was owned by the partnership and designated the partnership as beneficiary (Pet. App. A-2 to A-3 and n. 2).

The various dealings with several insurance companies to obtain the Null insurance policies were the bases for ten of the mail and wire fraud counts of the indictment. Among these were numerous applications and dealings with Prudential Insurance Company for coverage on Null's life,[4] similar dealings with New England Mutual from which a policy on Null's life was obtained, and successful dealings with Bowes & Company and Lloyd's of London for a $2,000,000 policy on Null, with the partnership as the beneficiary.[5]

On November 1, 1972, petitioner went to the home of an acquaintance of 25 years, John Alsop, and offered him $5,000 if he would murder an inventor in East St. Louis. He told Alsop that the inventor's wife wanted some "policies" cancelled and that he wanted the inventor killed in the near future, dur-

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[4] No policy was actually obtained from Prudential.

[5] See Tr. 101-106; Gov't. Exh. 1; Tr. 106-110, 259; Gov't. Exhs. 1B, 1C; Tr. 111-116, 231-232, 1042-1043, 1097-1099, 1107; Gov't. Exhs. 4, 6, 94, 107, 108; Tr. 133-136, 370-385, 425, 495-497; Gov't. Exh. 20; 1086, 1099-1102, 1105; Gov't. Exhs. 97, 49, 102; Tr. 386-387; Gov't. Exh. 21; Tr. 386-394, 509-511; Gov't. Exhs. 21, 24, 25; Tr. 394, 395-397, 509-511; Gov't. Exhs. 25, 33; Tr. 1141-1152; Gov't. Exh. 118; Tr. 1161-1163, 1249; Gov't. Exh. 119; Tr. 927-929, 931-935; Gov't. Exhs. 68, 69, 70, 71; Tr. 934, 937-938; Gov't. Exhs. 72, 125; Tr. 939-940; Gov't. Exhs. 73, 126.

ing a time when petitioner would be in Florida. Petitioner wanted Alsop to go to the inventor's East St. Louis office early one morning and shoot the inventor in the head several times with a .22 or .25 caliber pistol (Alsop Tr. 149, 156-158).

When Alsop balked, petitioner asked him to think it over (Tr. 160, 162). The next day petitioner called from the partnership premises in Illinois to Alsop's residence in Missouri and asked Alsop if he had made up his mind.[a] Alsop again declined the offer (Alsop Tr. 166).

On November 9, 1972, two days after petitioner had gone to Florida (Tr. 1852), Null's body was found in his East St. Louis workshop (Tr. 1450-1455). He had been shot four times in the head with a .22 caliber firearm (Tr. 1402-1408). There were no signs of forced entry, and nothing was reported missing, although the office had the appearance of having been ransacked (Tr. 1393, 1408-1410, 1417-1418, 1454, 1462; Gov't. Exhs. 135-139). The murderer has never been found.

Shortly after the murder, petitioner told Hintz to warn Alsop to keep his mouth shut, if he did not wish to see his (Alsop's) daughter harmed (Hintz Tr. 49). Subsequently, petitioner offered to give Hintz $100,000 tax-free "from our policy" if he

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[a] This interstate telephone call was the basis of Count 11 of the indictment. Telephone company records were introduced to establish that a call had been placed by an unknown party from the East St. Louis partnership office to Alsop's home in the early afternoon of November 2, 1972 (Alsop Tr. 164-166; Gov't. Exh. 133).

would corroborate petitioner's deposition testimony that Hintz had expressed an interest in acquiring Null's engine (Hintz Tr. 50-51).

## ARGUMENT

1. Petitioner contends (Pet. 14-17) that the Department of Justice attorney who presented this case to the grand jury lacked proper authorization to appear before that body and that the resulting indictment was therefore invalid (Pet. 14).

Petitioner raised this contention for the first time more than six months after his conviction. The court of appeals properly concluded that, by not making this claim prior to trial, petitioner had waived his objection (Pet. App. A-5). See Fed. R. Crim. P. 12(b)(2); *Davis* v. *United States*, 411 U.S. 233, 236-237. The court of appeals also properly rejected petitioner's contention on the merits (Pet. App. A-5 to A-6). See 28 U.S.C. 515(a); *United States* v. *Wrigley*, 520 F.2d 362 (C.A. 8), certiorari denied, No. 75-5284, November 17, 1975; *United States* v. *Agrusa*, 520 F.2d 370 (C.A. 8); *DiGirlomo* v. *United States*, 520 F.2d 372 (C.A. 8); *In re Persico*, 522 F.2d 41 (C.A. 2); *In re DiBella*, 518 F.2d 955 (C.A. 2).[7]

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[7] Our position on the merits is set forth in our memorandum in opposition in *Wrigley*, upon which we rely, and in the opinion of the court of appeals in *Wrigley*. See 520 F.2d 362. We are sending petitioner a copy of our memorandum in opposition in the *Wrigley* case.

2. Petitioner claims (Pet. 17-20) that the government deliberately concealed the fact of relocation payments made to Charles Hintz and that, as a result, petitioner could not successfully attack Hintz's credibility when he testified as a government witness at trial.

Prior to trial, Mr. and Mrs. Alsop and Mr. Hintz were relocated for their safety, pursuant to the witness relocation program. The day before Hintz was to testify, the government made him available to counsel for petitioner (Tr. 342, 471-474). The afternoon prior to Hintz's testimony the government informed petitioner that "no promises of immunity" had been made and that Hintz had received no benefits other than those normally "associated with witness protection" (Tr. 484). While defense counsel did not probe the area of benefits during his cross-examination of Hintz, he did reserve the right to recall him.

During his cross-examination of Mr. Alsop, defense counsel brought out the amount and duration of the payments Alsop had received under the witness relocation program (Alsop Tr. 194-196). Although he was aware that Hintz, like Alsop, had been relocated pursuant to that same program, defense counsel did not recall Hintz to the stand. However, in closing argument, he emphasized that "you can pretty well surmise that if they're paying John Alsop they're paying good old Charlie [Hintz] as well" (Tr. 2122).

There is no substance to petitioner's claim that the government misrepresented or concealed the fact of relocation payments to Hintz and thereby deprived him of the opportunity to attack Hintz's credibility. The record shows that petitioner was aware before Hintz testified that Hintz, like Alsop, had been relocated pursuant to the witness relocation program and had been advised that Hintz was receiving no benefits other than those normally "associated with witness protection" (Tr. 484). This representation was entirely accurate. Even if petitioner was then unaware that such relocation involves subsistence payments, this fact was brought to his attention during the subsequent testimony of Alsop, and he argued to the jury that Hintz was probably receiving relocation payments. In the circumstances presented here, the court of appeals correctly concluded (Pet. App. A-11) that there was no misrepresentation or nondisclosure by the government, and that petitioner suffered no prejudice.

3. Petitioner argues (Pet. 20-22) that it was error for the trial court not to have adopted his proposed instruction which would have required for conviction a finding that "the defendant must have contemplated the use of the mails or wire facilities" and that the use contemplated "must be an essential part of the alleged scheme" (Pet. 22).

The trial court properly rejected petitioner's proposed instruction because it was incorrect. As the court of appeals noted (Pet. App. A-26 to A-27), this Court announced the following standard governing

a defendant's connection with the use of the mails—which applies equally to the use of wire facilities—in *Pereira* v. *United States*, 347 U.S. 1, 8-9:

> [I]t is not necessary to show that petitioners actually mailed * * * anything themselves; it is sufficient if they caused it to be done. * * * [Nor is it] necessary that the scheme contemplate the use of the mails as an essential element. * * * Where one does an act with knowledge that the use of the mails will follow in the ordinary course of business, or where such use can reasonably be foreseen, even though not actually intended, then he "causes" the mails to be used.

In the instant case, the evidence shows that petitioner knew that the use of the mails or wires would necessarily follow from his acts.[8] Moreover, since petitioner had been registered with the State of Missouri as a life insurance agent (Tr. 1276-1280; Gov't. Exh. 127), he could reasonably have foreseen that the numerous insurance applications, medical forms and responses by the insurance companies would be sent by mail or wire.[9]

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[8] See transcript pages and exhibits cited in note 5, *supra*, and accompanying text.

[9] Petitioner's reliance on *United States* v. *Maze*, 414 U.S. 395, to support his assertion that his conviction cannot stand because "there was no use of the mails for the purpose of executing the scheme" (Pet. 20) is misplaced. *Maze* held only that, after a scheme is brought to fruition and the benefits from it have already been received, subsequent mailings of sales slips that serve only to allocate the loss between the victims of a stolen credit card do not come within the reach of 18 U.S.C. 1341. As the mailings and use of the wires here occurred before the scheme was completed, *Maze* is inapposite (Pet. App. A-9).

4. Petitioner next contends (Pet. 22-25) that the government was improperly permitted to present certain evidence which was unduly prejudicial because it tended to establish that he had committed other crimes not charged in the indictment. However, the court of appeals correctly concluded that the trial court did not abuse its discretion in admitting the evidence because its probative value outweighed its prejudicial effect. (Pet. App. A-12 to A-19).

The testimony of Hintz, Beck, Held and Baker concerned petitioner's sizing up of the latter three individuals as prospective business partners, including the testimony of Held and Baker that petitioner had expressed a desire to insure their lives. Not only did petitioner not object to this testimony, but, as the court of appeals concluded (Pet. App. A-15 to A-16), it was not evidence of "other crimes" but evidence of the very crime for which petitioner was convicted. See, *e.g.*, *Reid* v. *United States*, 334 F.2d 915, 918 (C.A. 9). Petitioner's search for an appropriate victim was "analogous to the 'casing' of several banks before robbing the most suitable target" and was properly admitted as evidence of preparation and planning for the scheme charged in the indictment (Pet. App. A-16). See Fed. R. Evid. 404(b).

Walsh, a co-partner in the rotary engine partnership, testified that, following Null's murder, petitioner told the partners that he had twice previously been a beneficiary on insurance policies at a time when a partner (Jack Edwards) or employer (Schucardt) had been shot. The court of appeals correctly

concluded that the statements were not impermissibly admitted to prove the matter asserted, but that they were properly admitted as verbal acts done by petitioner in furtherance of the fraudulent scheme; petitioner may have been seeking either to "enlist the aid of the partners in an anticipated fight to recover the proceeds on the Null policies" or "to assuage any suspicions which might later arise and to cover up his role in Null's death" (Pet. App. A-16).

The testimony of six other witnesses (including that of Mr. and Mrs. Alsop) and the introduction of several exhibits pertained to the gunshot death of Jack Edwards (petitioner's partner in an earlier business venture) and the collection by petitioner of the $300,000 in insurance proceeds he received as a consequence of that death. The court of appeals correctly concluded (Pet. App. A-17 and n. 15) that such evidence was admissible on at least two separate grounds: it was relevant to the determination whether petitioner intended to defraud the insurance companies when he applied for and purchased the insurance on Null's life, and it also showed petitioner's motive for devising the scheme in the manner chosen. Evidence of other wrongful acts is admissible to show either intent or motive. Fed. R. Evid. 404(b); McCormick, *Evidence*, § 190 (2d ed. 1972). See also cases cited at Pet. App. A-18.

Moreover, both Mr. and Mrs. Alsop testified without objection that petitioner had stated that he had personally shot Edwards (Pet. App. A-17 and n. 14). In these circumstances, the prejudice that may

otherwise have flowed from the admission of any additional evidence on this subject "was minimal" (Pet. App. A-18). Petitioner was further protected from undue prejudice by the trial court's instruction that the jury was to consider the evidence only as it may bear on the issue of intent, and that the jury could consider it only "after it had concluded from independent evidence that the other elements of the offense had been proven" (Pet. App. A-18 to A-19).[10]

5. Petitioner argues (Pet. 25-27) that certain testimony by Mrs. Null (the widow of the deceased inventor) was inadmissible hearsay.

Mrs. Null testified that her husband had told her shortly before his death that he intended to speak to petitioner about cancelling the insurance and getting out of the partnership. Such testimony was therefore properly admitted, if relevant to an issue in the case (as the courts below found it was), under the "state of mind" exception to the hearsay rule. Fed. R. Evid. 803(3). As the court of appeals stated (Pet. App. A-21 to A-22):

> The evidence was admitted for the purpose of showing that it was likely that Null had in fact approached the defendant and sought to back out of the partnership and cancel the insurance; in other words, that he had acted in conformity with his expressed intentions. Whether he had so acted was a material fact since, if true, it

[10] The court had instructed the jury that the burden was on the government to prove that petitioner intended to defraud the insurance companies at the time when he had caused the use of the mails and wires (Tr. 2200-2202).

> would establish the immediate motivation for the defendant's visit to Alsop. It would also corroborate Alsop's testimony that the defendant had stated that the shooting must be accomplished quickly because the victim "wanted to cancel the policies or get out." * * *
>
> A declarant's out-of-court statement of intention is admissible to prove that the declarant subsequently acted in conformity with that intention, if the doing of that act is disputed material fact. *Mutual Life Insurance Co.* v. *Hillmon*, 145 U.S. 285 (1892); Federal Rule of Evidence 803(3). *See also* McCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 295 (2d ed. 1972) * * *.

6. Petitioner claims (Pet. 27-30) that publicity before and during trial deprived him of a fair trial.

As the court of appeals noted (Pet. App. A-6 to A-7 and n. 4), petitioner has neither alleged nor demonstrated how he was prejudiced. He points to no instance in which the news accounts were anything but factual or where a news account might have gone beyond the evidence presented to the jury. He did not request that the jury be sequestered and does not contend that the *voir dire* was inadequate. Nor does he suggest that any particular juror should have been discharged or that any juror violated the court's repeated admonitions to avoid all news accounts of the trial (Pet. App. A-6).

"Petitioner has failed to show that the setting of the trial was inherently prejudicial or that the jury selection process * * * permits an inference of actual

prejudice." *Murphy* v. *Florida*, 421 U.S. 794, 803. His unsupported and generalized allegation that "the trial atmosphere was saturated with the news media and reporters' intrusions" to such a degree that he could not have had a fair trial (Pet. 29-30) is insufficient to warrant overturning his conviction.[11]

7. Petitioner's final contention (Pet. 31-34) is that the 45-year sentence was excessive. He argues that, since he was convicted of only one scheme or course of conduct, the highest permissible sentence was the five-year maximum for violation of the mail or wire fraud statute.

Each separate use of the mails and interstate wire facilities, however, is a separate offense, notwithstanding that the defendant may have been engaged in a single fraudulent scheme. *Badders* v. *United States*, 240 U.S. 391, 394; *Henderson* v. *United States*, 425 F.2d 134, 138, n. 4 (C.A. 5). Petitioner was convicted on eleven counts of mail and wire fraud and on one count of conspiracy (which is a separate offense, see *Iannelli* v. *United States*, 420 U.S. 770, 777-778), each of which carries a maximum possible punishment of five years' imprisonment. His 45-year sentence was well within statutory limits. *United States* v. *Tucker*, 404 U.S. 443,

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[11] This case is unlike *Marshall* v. *United States*, 360 U.S. 310, 312, where jurors were shown to have been exposed "to information of a character which the trial judge ruled was so prejudicial it could not be directly offered as evidence."

447; *Dorszynski* v. *United States*, 418 U.S. 424, 431-432.[12]

## CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
*Solicitor General.*

FEBRUARY 1976.

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[12] The sentence reflects a consideration by the trial judge of the relevant factors. As the court of appeals noted (Pet. App. A-31), petitioner "stood convicted of a coldblooded scheme, involving the stalking and selecting of a victim with the intention of murdering him for the purpose of obtaining money." See *Williams* v. *Oklahoma*, 358 U.S. 576, 585-586 ("[T]he sentencing judge is authorized, if not required, to consider all of the mitigating and aggravating circumstances involved in the crime," including the fact that the kidnapping victim was murdered). The facts of this case are thus fundamentally different from those in *United States* v. *Mackay*, 491 F.2d 616 (C.A. 10), cited by petitioner (Pet. 32), for there the crime revolved around a stock fraud and involved no violent acts.

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IN THE

# SUPREME COURT OF THE UNITED STATES

75-750

OCTOBER TERM, 1975

RONALD F. CALVERT,
Petitioner,

vs.

UNITED STATES OF AMERICA.

## REPLY BRIEF OF PETITIONER

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IN THE

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RONALD F. CALVERT,
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vs.

UNITED STATES OF AMERICA.

## REPLY BRIEF OF PETITIONER

### INTRODUCTION

This reply brief of petitioner Ronald F. Calvert is being filed initially in typewritten form, with printed copies to be forwarded as soon as available. It is the understanding of counsel that, pursuant to the provisions of Rule 24(3) of this Court, the petition for a writ of certiorari has been distributed by the Clerk to the Court, and that the matter is set for consideration at a conference on February 20, 1976.

The petition for a writ of certiorari was docketed on November 21, 1975. To the knowledge of counsel for petitioner, no extension of time was granted to the government for the filing of its brief in opposition, but copies of the government's brief in opposition were not received by counsel for petitioner until February 17, 1976. Because of such delay, it is impossible for counsel for petitioner to file a printed reply brief prior to the date of the conference. The Court's permission to file the typewritten copies is respectfully requested.

## REPLY BRIEF

Pursuant to Rule 24(4) and 24(5) of this Court, petitioner submits the following reply to the government's brief in opposition:

On pages 8 and 9 of its brief in opposition, the government discusses the inducements to Charles Hintz and suggests to this Court that during the trial defense counsel was aware of relocation payments to Hintz. There is absolutely no foundation in the trial record for the statement on page 8 that "although he (defense counsel) was aware that Hintz, like Alsop, had been relocated pursuant to that same (witness relocation) program," or the statement on page 9 that "the record shows that petitioner was aware before Hintz testified that Hintz, like Alsop, had been relocated pursuant to the witness relocation program . . ." When Hintz testified, there was nothing to indicate to defense counsel that Hintz was receiving any monetary or other benefits under the witness relocation program. In fact, the government's representations were to the contrary, for in response to direct inquiry by defense counsel and the trial Court, government counsel failed to disclose, and in fact concealed, the monetary payments to Hintz. The discussion in chambers was as follows (Tr. 483-484):

> "Mr. Baris (Defense counsel): I'd like to request of the Government to indicate as to whether any promises, immunity or other benefits have been granted to this witness.
>
> Mr. Coonan (Government counsel): You can inquire.
>
> Mr. Baris: I can inquire——
>
> Mr. Coonan: Of him.
>
> Mr. Baris: Well, I think the Government is under a duty to disclose.

Mr. Coonan: Well, whether it is or not, I'll tell you. He has had no promises of immunity and the only other promises we've made him is that Ronnie Calvert or any of his friends won't be able to kill him if we can prevent it.

The Court: Have any other benefits been given to him?

Mr. Coonan: Other than the normal benefits associated with witness protection.

Mr. Baris: All right."

It was not until the government filed its brief in the Court of Appeals that there was any reference to the witness relocation program. For the first time the government admitted (page 38 of its brief in the Court of Appeals) that "prior to trial Mr. and Mrs. Alsop and Charles Hintz were relocated for their safety pursuant to the witness relocation program." The government has not referred this Court to any specific place in the trial record where government counsel advised the defense that Hintz had been relocated or was receiving relocation payments.

Now it appears that the full story of inducements to Hintz has still not been revealed by the government. Recently there were articles in the St. Louis newspapers indicating even greater inducements to Hintz than those admitted in the Court of Appeals. Attached to this Reply Brief are copies of newspaper articles which appeared in the St. Louis Globe-Democrat of January 10-11, 1976 (Appendix A) and the St. Louis Post-Dispatch of January 11, 1976 (Appendix B). The articles reveal that not only Hintz but also his girl friend "had been given new identities and relocated." Certainly benefits to his girl friend would be inducements to Hintz and a relevant factor in determining his credibility.*

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* This recent revelation as to Hintz's girl friend is also relevant to another issue which was raised in the Court of Appeals (Pet. App. A-11) but which, in the interests of brevity, was not a question pre-

We suspect that the entire story of inducements to Hintz and others closely associated with him has still not been fully revealed. Only by the command of this Court can the facts come to light. If the Department of Justice were required to disclose all details of inducements to their witnesses in this case, we believe there would be no doubt of the concealment and misrepresentation by the government at the trial.

We respectfully submit that *Giglio v. United States*, 405 U.S. 150 (1972), requires such disclosure and necessitates a reversal of petitioner's conviction.

## CONCLUSION

For the reasons set forth in the petition for writ of certiorari, as well as the reasons set forth herein, it is respectfully submitted that the petition for writ of certiorari should be granted.

Respectfully submitted

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sented in this petition. The trial Court would not allow petitioner to cross-examine Hintz concerning his relationship with the girl friend and to inquire whether he had taken her across state lines and shared quarters with her (Hintz Tr. 72-73). The purpose of such cross-examination was to reveal a Mann Act violation and to develop whether Hintz had been granted immunity in return for his testimony in this case. Now the revelation of benefits for the girl friend as well as Hintz brings the issue of restriction of his cross-examination into sharper focus.

# APPENDIX A

**APPENDIX B**

8G Sun., Jan. 11, 1976 ST. LOUIS POST-DISPATCH

# Witness In Null Case Abducted

Charles Hintz, a key government witness in the 1974 trial of Ronald F. Calvert, was abducted from the home of a woman friend's mother in west St. Louis County Thursday, the federal Organized Crime Strike Force here says. Hintz was left in Chicago by his captors that night.

Hintz, 48 years old, was a boyhood acquaintance of Calvert, who was found guilty of mail and telephone fraud in connection with the murder in November 1972 of Victor G. Null.

Null, who had invented what he asserted was a revolutionary rotary engine, was found shot to death in his East St. Louis office after Calvert had insured his life for $2,350,000.

At the trial, Hintz testified that Calvert had asked to use Hintz's name on an insurance policy as a straw-party beneficiary, to conceal Calvert's ownership of the policy.

Hintz and his woman friend had been given new identities and been relocated after the trial because of threats on their lives.

Neither was supposed to be in the St. Louis area. The abduction occurred at the home of the woman friend's mother, who admitted two men at about 12:30 p.m. Thursday after they asked for her daughter by name.

The two men displayed weapons, announced a robbery, took cash and jewelry and left with Hintz, who was found in Chicago at about 9:45 that night.

Calvert is serving a 45-year prison sentence. A Strike Force officer would give no information on the reason for the abduction or statements Hintz may have made about it.